TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 188.

JOHN ROEHM, PETITIONER,

vs.

PAUL R. G. HORST, E. CLEMENS HORST, AND LOUIS A. HORST, LATE TRADING UNDER THE FIRM OF HORST BROS., TO THE USE OF E. CLEMENS HORST AND LOUIS A. HORST.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 16, 1899.
CERTIORARI AND RETURN FILED FEBRUARY 2, 1899.

(17,262.)

(17,262.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 188.

JOHN ROEHM, PETITIONER,

vs.

PAUL R. G. HORST, E. CLEMENS HORST, AND LOUIS A. HORST, LATE TRADING UNDER THE FIRM OF HORST BROS., TO THE USE OF E. CLEMENS HORST AND LOUIS A. HORST.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX

	Original.	Print.
Caption	*a*	1
Transcript from circuit court of the United States for the eastern district of Pennsylvania	1	1
Writ of error	1	1
Citation	1	2
Acceptance of service	2	2
Docket entries	2	2
Caption	4	4
Præcipe for summons	5	4
Summons and return	5	5

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1899.

	Original.	Print.
Statement of claim	7	6
Appearance	14	12
Affidavit of defense	15	12
Rule to plead	17	14
Plea	18	15
Replication	18	15
Stipulation as to trial	19	15
Verdict	19	16
Opinion ordering judgment	19	16
Motion for new trial	28	23
Argued on motion	29	25
Opinion denying motion	30	25
Judgment	30	26
Bill of exceptions	31	26
Hop contracts, August 25, 1893	32	27
Hop contracts, August 25, 1893	33	28
Hop contracts, August 25, 1893	34	28
Letter, Horst Bros. to Roehm, June 23, 1896	34	29
Letter, Roehm to Horst Bros., June 27, 1896	35	29
Letter, Horst Bros. to Roehm, July 3, 1896	35	30
Letter, Horst Bros. to Roehm, September 3, 1896	35	30
Letter, Horst Bros. to Roehm, September 4, 1896	36	30
Letter, Roehm to Horst Bros., September 14, 1896	36	30
Telegram, Horst Bros. to Roehm, September 21, 1896	37	31
Letter, Horst Bros. to Roehm, September 21, 1896	37	31
Letter, Horst Bros. to Roehm, October 9, 1896	37	31
Telegram, Roehm to Horst Bros., October 24, 1896	38	32
Letter, Roehm to Horst Bros., October 24, 1896	38	32
Letter, Moon to Horst Bros., October 31, 1896	38	32
Letter, Paul R. G. Horst to Roehm, July 1, 1896	39	32
Letter, Moon to Paul R. G. Horst, October 24, 1896	39	33
Letter, Moon to Horst Bros., October 31, 1896	39	33
Letter, Moon to Prichard, —— —, —	40	33
Testimony of Lorenzo D. Jacks	40	33
Plaintiff rests	50	42
Testimony of John Roehm	50	42
Louis H. Wehmeyer	59	50
John Thomas	62	52
Myer Gattman	63	53
Defendant rests	69	58
Testimony of Lorenzo D. Jacks (in rebuttal)	69	58
Deposition of E. Clemens Horst	70	59
T. P. Lovdal	80	67
Charles Schmidt	81	68
Rudolph Wittenbrock	83	70
H. Uehtmann	85	71
Kola Neis	86	73
T. A. Livesly	88	74
Wm. Uhlman	90	75
Objections to testimony of John Roehm	100	84
Exceptions to opinion and rulings	102	86
Judge's certificate to bill of exceptions	102	86

	Original	Print.
Petition for writ of error	103	87
Assignment of errors	104	88
Bond on writ of error	106	90
Clerk's certificate	108	91
Opinion	110	92
Judgment	117	96
Clerk's certificate	118	96
Writ of certiorari	119	97
Stipulation as to return to certiorari	122	97
Return to writ of certiorari	123	98

United States Circuit Court of Appeals for the Third Circuit, September Term, 1898.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Plaintiff in Error,
vs.
PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Bros., to the Use — E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Defendants in Error. } No. —.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Filed May 20, 1898.

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, late trading under the firm of Horst Bros., to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, plaintiffs, and John Roehm, of the State of Pennsylvania, residing in the eastern district of Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said John Roehm, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the third circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 17th day

of March, in the year of our Lord one thousand eight hundred and ninety-eight.

SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed by—
GEO. M. DALLAS,
Circuit Judge.

March 17, 1898.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the
2 State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Bros., to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia within thirty days, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania wherein John Roehm is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the circuit court of the United States, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

GEO. M. DALLAS, *Judge.*

I hereby accept service of the above citation.

THOMAS S. GATES,
For FRANK P. PRICHARD,
Att'y for Horst et al.

October Sessions, 1896.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	Frank P. Prichard. John A. Garver. 42. Summons Assumpsit.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	R. O. Moon.

January 23, 1897.—Præcipe for summons filed. Summons exit returnable first Monday in February next.

3 January 23, 1897.—Plaintiffs' statement filed.

February 1, 1897.—Summons returned served January 25, 1897, with copy of plaintiffs' statement of claim.

February 10, 1897.—R. O. Moon, Esq., appears for defendant.

February 10, 1897.—Affidavit of defence filed.

February 10, 1897.—Rule to plead filed.

February 26, 1897.—Plea filed.

March 5, 1897.—Replication filed.

September 29, 1897.—Testimony of H. Uchtmann, T. A. Livesly and Kola Neis, taken before Webster Holmes, notary public of Marion county, Oregon, filed.

October 11, 1897.—Depositions of E. Clemens Horst, T. B. Lovdal, Rudolph Witterbrock and Charles Schmidt, witnesses on behalf of plaintiffs, taken before Lee D. Craig, notary public, San Francisco, California, filed.

November 3, 1897.—Stipulation of counsel waiving trial by jury and submitting issue to trial by the court filed.

December 13, 1897.—Deposition of William Uhlman, on behalf of defendant, filed.

December 13, 1897.—Trial before Dallas, circuit judge, in accordance with stipulation.

January 27, 1898.—Opinion of Dallas, judge, ordering that judgment be entered as of this date in favor of plaintiffs and against the defendant in the sum of ten thousand one hundred and eighteen $\frac{30}{100}$ dollars ($10,118.30).

February 1, 1898.—Motion and reasons for a new trial filed.

February 23, 1898.—Argued surmotion for a new trial.

February 25, 1898.—Opinion Dallas, judge, discharging rule for a new trial. Judgment entered accordingly.

February 28, 1898.—Bill of exceptions filed.

March 4, 1898.—Plaintiff's bill of costs filed.

March 17, 1898.—Petition for writ of error filed.

March 17, 1898.—Writ allowed (security to be entered in the sum of twenty-two thousand dollars) and issued, and copy lodged in clerk's office for adverse party.

March 17, 1898.—Assignments of error filed.

March 29, 1898.—Bond surwrit of error filed.

March 29, 1898.—Citation issued.

April 29, 1898.—Citation returned; service accepted.

4 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	October Sessions, 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1896, No. 42.

It thus contained:—

Be it remembered that on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety-seven, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst by their counsel, Frank P. Prichard and John A. Garver, come into our court here and sue forth therefrom a writ of summons against John Roehm, which, with the endorsement and return thereto, is in the words and figures following to wit:—

5

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

SIR: Issue summons in assumpsit in the above-entitled case returnable the first Monday of February, *sec. leg.*

FRANK P. PRICHARD,
JOHN A. GARVER,
Attorneys for Plaintiff.

To clerk U. S. C. C., E. D. of Pa.

Endorsed: Oct. sess., 1896. No. 42. C. C. U. S., E. D. of Pa. Horst *et al. vs.* Roehm. Præcipe summons in assumpsit. Filed January 23, 1897. Samuel Bell, clerk. John A. Garver, Frank P. Prichard.

UNITED STATES, } *ss.:*
Eastern District of Pennsylvania, }

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you, that you summon John Roehm, a citizen of the State of Pennsylvania, residing in the eastern district of Pennsylvania, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court, to be holden at Philadelphia on the first Monday of February next, to answer to Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citi-
6 zen of the State of Illinois, late trading under the firm of Horst Brothers, to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, in a plea of assumpsit; and have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 23d day of January, A. D. 1897, and in the 121st year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.,
Per M.

Endorsed: No. 42. Circuit court, October session, 1896. Paul R. G. Horst, to use of, etc., *vs.* John Roehm. Summons assumpsit. Filed February 1, 1897. Samuel Bell, clerk.

Returnable on the first Monday of February next.

F. P. PRICHARD,
JOHN A. GARVER,
Attorneys for Plaintiff.

January 25, 1897.—At Philadelphia, in my district, served the within writ on John Roehm by giving him a true and attested copy thereof and making known the contents of the same. So answers

JAMES B. REILLY,
U. S. Marshal,
Per ABRAM B. MYERS, *Deputy.*

7 *Statement of Plaintiff's Demand.*

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., E. D. of Pa., October Sess., 1896. No. —.

Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Bros., to the use of R. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, claim to recover from John Roehm, a citizen of the State of Pennsylvania, who resides in the eastern district of Pennsylvania, the sum of ten thousand five hundred and eighty-four dollars, with interest, from the twenty-fourth day of October, 1896, for breach of contract, under the following circumstances:

On August 25th, 1893, the said firm of Horst Brothers and the said defendant, John Roehm, entered into four written contracts; two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897.

The following are copies of the said four contracts:

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, par*ties* of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that par*ties* of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

8

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus

chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month March, April, May, June, July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

9 In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for and receive from the

party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the part*ies* of the second part, other hops, in fulfillment of this agreement, and part*ies* of the second part agree- to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, part*ies* of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the part*ies* of the second part, and that part*ies* of the second part agree- to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month March, April, May, June July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the part*ies* of the second part, other hops, in fulfillment of this agreement, and part*ies* of the second part agree- to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

The hop crop is gathered, according to usual custom, in the summer, and the months named in the said contracts are, according to the custom of the trade, the months of that name next after the summer months of the year of the crop.

At the date of the said contracts the firm of Horst Brothers was composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst. On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, all interest in the said contracts with the defendant, John Roehm. On June 27th, 1896, the defendant, John Roehm, wrote to the firm of Horst Brothers the following letter:

"PHILADELPHIA, *June* 27, 1896.

Messrs. Horst Bros., 42 Pearl street, New York city.

DEAR SIR-: Yours of the 23d inst. notifying me of the dissolution of the copartnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific Coast hops of the crop of 1897, which, of course, you
11 cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability, on your part, to comply with the contracts.

Yours truly, JOHN ROEHM."

To this letter the firm of Horst Brothers, on July 3d, 1896, sent the following reply:

"NEW YORK, *July* 3, 1896.

Mr. John Roehm, No. 856 Charlotte St., Philadelphia, Pa.

DEAR SIR: In answer to yours of the 27th ultimo we beg to say that you have misconstrued the meaning of the notice of dissolution sent out by us to the trade. Its meaning was simply that no new contracts would be made and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any releases or discharges, and will punctually live up to all contracts which it has made with you.

Yours respectfully, HORST BROS.,
In Liquidation.

In October, 1896, plaintiffs made the first shipment of twenty (20) bales of hops required under the above contracts, and sent to the defendant, John Roehm, the invoice and bill of lading covering the same.

On October 24th, 1896, defendant sent to plaintiffs the following telegram and letter:

Pacific Postal Telegraph-Cable Co.

PHILADELPHIA, PA., *October 24th*, 1896.

Horst Brothers, San Francisco.

I decline to receive shipment of hops October ninth. Particulars by mail.

JOHN ROEHM."

12 " PHILADELPHIA, *October* 24, 1896.

Messrs. Horst Brothers, No. 220 California St., San Francisco, California.

GENTLEMEN: Yours of October 9th enclosing bill of lading and bill of particulars for 20 bales of hops, forwarded me under the terms of contract of August 25th, 1893, was received and I have wired you that I decline to receive the same.

I notified you under date of June 27th, 1896, that owing to the dissolution of the copartnership with which I originally contracted, and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere.

I am advised that I am under no obligation by that contract to accept supplies from you.

If you desire to bill these goods at the current market rates, under a new contract, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

Very truly yours, JOHN ROEHM."

And on the same date his counsel sent to plaintiffs the following letter:

" Offices of R. O. Moon, attorney and counselor at law, 1530 Chestnut St.

PHILADELPHIA, *October* 24, 1896.

Paul R. G. Horst, Esq., 42 Pearl St., New York city.

DEAR SIR: I am instructed by my client, Mr. John Roehm, of this city, to notify you, in confirmation of his communication of June 27th, that, for reasons therein stated, he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

I have advised him, upon an examination of all the facts surrounding this case, that he has a right to terminate this contract.

Very truly yours, R. O. MOON."

13 Defendant has never withdrawn the said refusal, and has refused to receive the shipment of hops by plaintiffs under said contracts, as aforesaid, or any hops thereunder.

The market price in New York city on October 24th, 1896, of prime Pacific Coast hops of the crop of 1896, of the kind, character and quality specified in the contracts for hops of that year, and deliverable as therein specified, was seven and one-half cents per pound, and the market price in New York city on October 24th, 1896, of prime Pacific Coast hops of the crop of 1897, of the kind, character and quality specified in the above contracts for hops of that year and deliverable as therein specified, was nine and one-half cents per pound. The average number of pounds in a bale of hops of the kind, character and quality specified in said contracts, according to the usual practice and custom of merchants dealing in such articles, both at the date of said contracts and on October 24th, 1896, was one hundred and ninety-six pounds net, after deducting the three and one-half pounds tare specified in said contracts.

Plaintiffs have, therefore, suffered a loss by defendant's breach of the above contract as follows:

First. A sum equal to the difference between twenty-two cents and seven and one-half cents per pound on 39,200 pounds of hops of the crop of 1896, to wit, the sum of five thousand six hundred and eighty-four dollars.

Second. A sum equal to the difference between twenty-two cents and nine and one-half cents per pound on 39,200 pounds of hops of the crop of 1897, to wit, the sum of four thousand nine hundred dollars.

Third. A sum equal to interest at six per cent. on the aggregate of the above sums, to wit, ten thousand five hundred and eighty-four dollars from October 24th, 1896, to the date of entry of judgment in this case.

Plaintiffs therefore claim from defendant the said sum of ten thousand five hundred and eighty-four dollars, with interest from October 24th, 1896, which sum plaintiffs aver is justly due and owing to them by defendant.

JOHN A. GA-VER.
FRANK P. PRICHARD.

STATE OF NEW YORK, }
County and City of New York, } ss:

E. L. Brown being duly sworn says: I am the agent for plaintiffs in New York city. One of the plaintiffs is at present in London and the other is in San Francisco. I make this affidavit on
14 their behalf. The matters alleged in the foregoing statement of claim, as the basis of the plaintiffs' demand in the above case, are true to the best of my knowledge and belief

E. L. BROWN.

Sworn and subscribed to before me this 21st day of January, A. D. 1897.

VICTOR CUMBERSON,
Notary Public, Kings County.

[SEAL.]

Certificate filed in N. Y. Co.

Endorsed: No. —. U. S. C. C., E. D. of Pa., October session, 1896. Horst Bros. *et al. vs.* John Roehm. Copy plaintiff's statement. Filed January 23, 1897. Samuel Bell, clerk. John A. Garver, Frank P. Prichard.

PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } C. C. U. S., E. D. of Pa., Oct. Sess., 1896. No. 42.

Please enter my appearance for the defendant.

R. O. MOON,
Attorney for Defendant.

February 9, 1897.

Samuel Bell, Esq., clerk U. S. C. C.

Endorsed: 42. October sess., 1896, U. S. C. C., E. D. of Pa. Horst *vs.* Roehm. Appearance. Filed Feb. 10, 1897. Samuel Bell, clerk. R. O. Moon, att'y for def't.

15 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania. } U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.

CITY OF PHILADELPHIA, *ss.*:

John Roehm, the defendant, being duly sworn, deposes and says, that he has a just and legal defence to the plaintiffs' claim of the following nature and character:

First. Deponent is advised that the four agreements made between plaintiffs and himself, all dated August 25, 1893, the first two providing for the sale and delivery by plaintiffs to himself of two hundred bales of prime Pacific Coast hops of the crop of the year 1896, deliverable at the rate of 20 bales each month from October, 1896, to July, in the year 1897, and the other two providing for the delivery of two hundred bales of the crop of the year 1897, at the rate of 20 bales each month from October, 1897, to July, in the year 1898, at the stipulated price of 22 cents per pound, are void at law as being mere gambling contracts or wagers on the prices of hops per pound at a period of four years subsequent thereto and in relation to things not in existence at the date of the said contracts, or the natural product or expected increase of hops sown and already belonging to the plaintiffs, or over the sowing and reaping of which four years after the date of the said contracts the plaintiffs not being

growers thereof, had no possible control, and could by no contract make certain to deponent their ability to make the deliveries in the year 1896 and 1897, as stipulated.

Second. Deponent says that on the 23d day of June, A. D. 1896, the firm of Horst Brothers, with whom he contracted was dissolved and notice of the same was given to deponent and that in consequence of said dissolution and withdrawal from business of the said plaintiffs' firm, they were unable to further carry out their contract with deponent, and that since that time the said firm of Horst Brothers, has never tendered to deponent any hops in conformity with the requirements of the said contract. Subsequent to
16 the said 23d day of June, a new copartnership was formed by and between E. Clemens Horst and Louis A. Horst, and the hops tendered deponent as set out in plaintiffs' statement of claim were tendered by the second new firm, and not the firm or copartnership with which deponent contracted, and he consequently declined and refused to accept the same, and gave plaintiffs notice of his reasons therefor.

Deponent further says that the said Paul R. G. Horst, who was the senior member of the firm of Horst Brothers, with whom he contracted is not a member of the new firm so formed, but is engaged in business for himself, and deponent further says that it was on account of the special knowledge and experience of the said senior member of the firm of Horst Brothers, to wit, the said Paul R. G. Horst, and his information and skill in selecting goods suited to de*de*fendant's business that he was induced to enter into the contract. Deponent himself although using hops extensively in his business has no considerable knowledge of their quality and relied upon the expert knowledge of the said Paul R. G. Horst, who has since engaged in business as a rival to the said dissolved firm of Horst Brothers, and deponent therefore says that by the dissolution of the firm with which he entered into said contract and the attempt to force upon him the goods furnished by another and different firm he is deprived of the substantial advantage of the judgment and experience of the senior member of the copartnership with which he contracted and was the chief cause that led him into the said contract.

Third. Deponent further says that he is advised if he is liable at all (which he denies), he is liable only for the difference in the price for the said 20 bales tendered as stipulated in his contract with Horst Brothers, to wit, the sum of twenty-two cents per pound and the present market value of the same goods; which the deponent avers is from thirteen to fifteen cents per pound instead of seven and one-half cents as alleged in plaintiffs' statement of claim.

Fourth. Deponent further says that according to the terms of the contract upon which plaintiffs base this action one hundred bales of the said hops were not to be delivered to and received by deponent until the month of April, May, June, and July of 1897; and two hundred bales of the same being of the crop of 1897, was not to be finally delivered until the month of July, 1898, are not in existence

and have no recognized standard of value or market price in New York, or elsewhere.

Deponent therefore avers that plaintiffs cannot recover damages as alleged in their statement of claim because no hops other than the twenty bales referred to have ever been tendered him by any parties; and that even if deponent were to continue to refuse future shipments as provided for in said contract (which he may or may not do), the plaintiffs even if they were entitled to recover at
17 all may suffer no damage as the value of the said hops at the time of delivery may be in excess of the price stipulated in said contract.

All of which deponent verily believes and expects to be able to prove on the trial of the cause.

JOHN ROEHM.

COUNTY OF PHILADELPHIA, *ss:*

John Roehm, being duly sworn according to law, doth depose and say, that the facts contained in the foregoing statement are true, to the best of his information, knowledge and belief.

JOHN ROEHM.

Sworn and subscribed before me this 9th day of February, 1897.

LEO BELMONT,
Notary Public.

Endorsed: 42. October sessions, 1896, circuit court of the United States, eastern district of Penna. Paul R. G. Horst *et al.*, to use, etc., *vs.* John Roehm. Affidavit of defence. Filed Feb. 10, 1897. Samuel Bell, clerk. R. O. Moon, att'y for defendant.

PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } U. S. C. C., E. D. of Pa., October Sessions, 1896. No. 42.

SIR: Enter rule on the above-named defendant to plead within fifteen days or judgment *sec. leg.*

FRANK P. PRICHARD,
JOHN A. GARVER,
Per T. S. GATES,
Attorneys for Plaintiffs.

To clerk U. S. C. C., eastern district Penna.

February 12, 1897.

Endorsed: 42. October sessions, 1896, U. S. C. C., E. D. of Pa. Paul R. G. Horst *et al.*, to use, etc, *vs.* John Roehm. Rule to plead. Filed Feb. 12, 1897. Samuel Bell, clerk, per M. Garver, Prichard.

18 PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } C. C. of U. S., E. D. of Pa., October Session, 1896. No. 42.

Defendant pleads non assumpsit.

R. O. MOON,
Attorney for Defendant.

February 24, 1897.

Col. BELL, clerk U. S. C. C.

Endorsed: No. 42. October session, 1896, circuit court U. S. E. D. of Pa. Paul R. G. Horst *et al.*, etc., *vs.* John Roehm. Plea. Filed Feb. 26, 1897. Samuel Bell, clerk, per M. R. O. Moon.

PAUL R. G. HORST ET AL., to the Use, etc., *vs.* JOHN ROEHM. } U. S. C. C., E. D. of Pa., October Sessions, 1896. No. 42.

The plaintiff replies similiter and issue.

JOHN A. GARVER,
FRANK P. PRICHARD,
Per T. S. G., *Attorneys for Plaintiffs.*

To clerk U. S. C. C., E. D. of Pa.

March 5, 1897.

Endorsed: 42. October session, 1896, U. S. C. C., E. D. of Pa. Horst *et al. vs.* Roehm. Replication. Filed March 5, 1897. Samuel Bell, clerk, per M. Garver, Prichard.

19 PAUL R. G. HORST ET AL. *vs.* JOHN ROEHM. } U. S. C. C., October Session, 1896. No. 42.

It is hereby stipulated and agreed that the jury is waived in the above case, and that the issue therein raised may be tried and determined by the court without the intervention of a jury.

FRANK P. PRICHARD,
Attorney for Plaintiff.
R. O. MOON,
Attorney for Defendant.

Philadelphia, October 28, 1897.

Endorsed: No. 42. October sess., 1896, U. S. C. C., E. D. of Pa. Paul R. G. Horst *et al. vs.* John Roehm. Stipulation of counsel waiving trial by jury and submitting issue to trial by court. Filed Nov. 3, 1897. Samuel Bell, clerk, per M.

And afterwards, to wit, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and ninety-seven came the parties aforesaid by their counsel aforesaid, and this cause being called for trial by the court and the evidence having been submitted and argument having been made by counsel for the re-

spective parties the court not being fully advised in the premises take further time for the consideration thereof.

And afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven came the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises orders judgment to be entered in favor of the plaintiffs and against the defendant in the sum of ten thousand one hundred and eighteen $\frac{30}{100}$ dollars, in the following opinion, to wit:

In the Circuit Court of the United States for the Third Circuit, October Sessions, 1896.

HORST BROTHERS ET AL. *vs.* JOHN ROEHM. } No. 42.

In pursuance of stipulation filed under section 649 of the Revised Statutes, this case has been tried by the court, without the intervention of a jury.

20 *Finding of Facts.*

On August 25th, 1893, the firm of Horst Brothers, composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, the legal plaintiffs, entered into four written contracts with John Roehm, the defendant, of which the following are copies:

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part,

other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific
21 Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, October, November, December, January, and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store

New York city and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the
22 first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, October, November, December, January, and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

The months named in each of these contracts respectively, as "time of shipment," must, under the custom of the trade, be understood as meaning the month so named, which would follow next after the summer months of the year of the crop referred to in the particular contract.

23 On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst in the said contracts.

Upon June 23d, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"JUNE 23, 1896.

DEAR SIR: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

Respectfully yours, HORST BROTHERS."

To this, under date of June 27th, 1896, the defendant replied, saying: * * * "I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, * * * which, of course, you cannot fulfill. I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts." In answer to this, Horst Bros. in liquidation addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Bros.; and in which it was further stated that, "so far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you." This communication was not replied to.

In October, 1896, the first shipment of twenty bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who, on October 24th, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27th, 1896, declined to receive the hops.

At the time of the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for "prime Pacific Coast hops of the crop of 1896," and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the con-

24 tracts sued on and these above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows:

Difference between contract price, 22 cents per pound, and 9 cents per pound, on 200 bales, 39,200 pounds, (a) 13 cents per pound.....	$5,096 00
Difference between contract price, 22 cents per pound, and 11 cents per pound, on 200 bales, 39,200 pounds, (a) 11 cents per pound.....	4,312 00
	$9,408 00
Interest from October 24th, 1896, to January 27th, 1896.	710 30
	$10,118 30

Opinion.

1. The position taken by the defendant in his letter of June 27, 1896, and again upon the trial, is untenable. His contracts with Horst Bros. were not annulled by the dissolution of that firm, nor by the assignment of one of the partner's interest therein to his co-partners. To hold otherwise it would be necessary to maintain that any dissolution of a commercial partnership accompanied by a division of its executory contracts, would work their extinguishment, and the statement of such a proposition is, I think, its sufficient refutation. Of course, the other contracting party may, notwithstanding dissolution and regardless of the terms thereof, hold all the partners upon a partnership contract; and, on the other hand, the contractual rights of the latter continue to be enforceable, though only by action (as in this instance) in the name of all to the use of such of them as, by agreement amongst themselves, may be entitled to the proceeds of recovery. The judgment in National Bank *vs.* Hall (101 U. S., 43) is not opposed to this view of the law. The conclusion there reached was based, primarily and mainly, upon the actual non-existence of an asserted contract, and what, at the close of the opinion, was said respecting "the change of the firm," who, "if in fact, there were * * * a contract" had been one of the parties to it, was unnecessary to the decision. But, aside from this, the facts of that case distinguish it from the present one, and the later decisions of the same court, hereafter cited, require that it shall be distinguished. Without pausing to point out the details of dissimilarity, it will suffice to observe that in the case referred to, the substance of the ruling was that a new party could not be imported into the contract there asserted, whereas in the case now under consideration, as already said, the parties are still, both as to liability and right, precisely the same as those by whom the contract was originally made. "Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confi-
25 dence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." This statement of the law was adopted by the Supreme Court in Arkansas Company *vs.* Balden Company, 127 U. S., 379. No statement more favorable to the defendant could be made; but the rule it embodies cannot avail him.

The liability of all the members of the plaintiff firm continue after dissolution to be precisely what it had been before; and there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the person who assigned to his copartners. It was on the allegation that such confidence existed in fact, that the defendant based his defence upon this point; and in support of this allegation the defendant testified, in general terms, to the effect that he had been influenced, or perhaps induced, to contract with the plaintiffs, by his reliance upon the judgment and fair dealing of Paul R. G. Horst; but the admission of this testimony was duly objected to by plaintiffs' counsel, and was received subject to that objection and with reservation of judgment upon it. I have no doubt that it was irrelevant; and, consequently, I have excluded it from consideration and have made no finding of fact with reference to it. As already indicated, I am of the opinion that "personal confidence" to preclude the transfer of rights arising out of contract must be involved in the nature of the rights themselves, so that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. If from the nature of the subject, personal confidence be not implied, the fact, if conceded, that the personal participation of one of several contractors in carrying out the contract had been actually relied upon would be of no consequence whatever. Delaware County *vs.* Diebold Co., 133 U. S., 473–488.

2. This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El. & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the supreme judicial court of Massachusetts, declined to decide whether or not it should be maintained "as applicable to the class of cases" to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour, to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the
26 contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

In my opinion the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered by Judge Lowell, in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be

repeated at length; but I may remark that I concur with that learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are "founded in good sense, and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic."

Since the decision of Dingley *vs.* Oler the circuit court of appeals for the sixth circuit has, in two cases (in both of which Dingley *vs.* Oler was cited), stated the law to be that "where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms * * *" Brewing Co. *vs.* Bullock, 59 Fed., 87; Lumber Co. *vs.* Alley, 43 U. S. App., 175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell, in Dingley *vs.* Oler, as well as by the English authorities, and by the judgments of the courts of several of the States.

3. On behalf of the defendant it has been contended that "assuming that the action can be maintained the measure of damages must be restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing of the suit." I cannot yield assent to this proposition. It conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit; and, the measure which might otherwise have been applicable is, therefore, wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken, or a wrong has been committed, compensation must be made. This is the underlying principle, and any standard or measure
27 which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted to. Carroll-Porter Co. *vs.* Columbus Co., 3 U. S. App., 633. In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and whatever might be the rule in a case in which this could not be shown, I am of opinion that, where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties, is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable. Hinckley *vs.* Pittsburg Co., 121 U. S., 264; Anvil Co. *vs.* Humble, 153 U. S., 549.

There was some variance in the evidence respecting the price at which subcontracts could have been obtained. The evidence on behalf of the plaintiff was that, on October 24, 1896, the price for the crop of 1896 would have been seven and one-half cents per pound, and for the crop of 1897, nine and one-half cents per pound. But the evidence for the defendant tended to show, as to each crop, that the price would have been greater. In my findings of fact I have not accepted the extreme position of either side. I do not think I would have been justified in relying wholly upon any part of the evidence, and my conclusion was arrived at after carefully considering the whole of it, and giving to every portion the weight to which I believe it to be entitled. I have had in mind the right of the plaintiffs to compensation, but have also been especially solicitous to avoid doing injustice to the defendant.

Judgment.

It is ordered that judgment be entered, as of this date, in favor of the plaintiffs and against the defendant, in the sum of $10,118.30.

GEO. M. DALLAS, *Judge.*

January 27, 1898.

28 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

Motion for New Trial and Reasons Therefor.

And now, to wit, this first day of February, A. D. 1898, comes the defendant, by his counsel, R. O. Moon and Samuel Dickson, Esqrs., and moves the court for a new trial, assigning therefor the following reasons:

1. The judgment was against the evidence.
2. The judgment was against the weight of the evidence.
3. The judgment was against the law.
4. The learned judge erred in finding as a matter of fact that "at the time of the defendant's refusal to receive the shipment above mentioned (to wit, October 24, 1896), the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for "prime Pacific Coast hops of the crop of 1896, and of eleven cents per pound for like hops of the crop of 1897."
5. The learned judge erred in finding *inter alia* as a matter of law

that "the position taken by the defendant in his letter of June 27, 1896, and again upon the trial (to wit, that the dissolution of the plaintiff firm annulled his contract with the said firm) is untenable. His contracts with Horst Bros. were not annulled by the dissolution of that firm, nor by the assignment of one of the partners' interest therein to his copartners."

6. The learned judge erred in finding *inter alia* as a matter of law that "there is nothing whatever in the contracts to indicate that they involve a relation of personal confidence between the defendant and Paul R. G. Horst, the person who assigned to his copartners."

7. The learned judge erred in excluding from consideration the testimony going to show the defendant's reliance upon the judgment and fitness of Paul R. G. Horst, and that he contracted with the plaintiffs in consequence thereof.

29 8. The learned judge erred in finding *inter alia* as a matter of law that "personal confidence to preclude the transfer of rights arising out of contract must be involved in the nature of the rights themselves, so that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. If from the nature of the subject, personal confidence be not implied, the fact, if conceded, that the personal participation of one of several contractors in carrying out the contract had been actually relied upon would be of no consequence whatever."

9. The learned judge erred in finding *inter alia* as a matter of law that "a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought."

10. The learned judge erred in finding *inter alia* as a matter of law that "in this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and whatever might be the rule in a case in which this could not be shown, I am of opinion that, where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties, is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable."

11. The learned judge erred in ordering that judgment be entered as of January 27, 1898, in favor of the plaintiffs and against the defendant, in the sum of $10,118.30.

SAMUEL DICKSON,
R. O. MOON,
Attorneys for Defendants.

Endorsed: In the circuit court of the U. S., E. D. of Penna. No. 43. October sessions, 1896. Paul R. G. Horst, etc., late trading, etc., to use, etc., *vs.* John Roehm. Motion for new trial and reasons. Filed Feb. 1, 1898. Samuel Bell, clerk. Moon, Dickson.

And afterwards, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and ninety-eight, came the parties aforesaid by their counsel aforesaid, and the cause being called for argument on defendant's motion for a new trial, and having been argued by counsel for the respective parties, and the court being not fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, came the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the Circuit Court of the United States, Eastern District of Pennsylvania, October Sessions, 1896.

HORST BROS. *vs.* ROEHM. } No. 42.

The learned counsel of the defendant have confined their argument in support of his rule for a new trial to the subject of damages. They have contended that the court erred with respect to the measure applied, and also in its finding of the amount recoverable in accordance with that measure; but I have not been convinced that a mistake was made on either point. I am still of opinion that the plaintiffs' right to compensation accrued at the time of the defendant's anticipatory breach of the several contracts, which were treated by the court, and correctly I think, as constituting a single one. The defendant's act, in repudiating them, gave to the plaintiffs a then present cause of action, and imposed — the defendant an immediate liability with respect to the entire transaction. At that time, as heretofore found, the plaintiffs could have made subcontracts according to their contracts with the defendant, and therefore the difference between the price at which such subcontracts could then have been obtained and the price named in the contracts in suit was the measure by which the sum which the defendant should be required to pay was to be ascertained. In accordance with this view the damages were assessed, and, as they were due and payable as of the date of breach, interest from that date was properly included; and any possible advantage which the plaintiffs may be conjectured to have acquired by reason of the defendant having, by his own conduct, established a premature time of liquidation was rightly not considered.

Upon an attentive review of the evidence, I perceive no reason for disturbing the finding originally made as to the prices at which subcontracts could have been obtained.

The defendant's rule for a new trial is discharged.

GEO. M. DALLAS, *J.*

February 25, 1898.

Endorsed: No. 42. Oct. sess., 1896, U. S. C. C., E. D. of Pa. Horst Bros. *vs.* Roehm. Opinion dismissing rule for new trial. Filed Feb. 25, 1898. Samuel Bell, clerk, per R.

And afterwards, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, judgment is entered in favor of the plaintiff and against the defendant for ten thousand one hundred and eighteen $\frac{10}{100}$ dollars.

31 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of Illinois,	U. S. C. C., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

Be it remembered, that in the said sessions of October, 1896, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said court held at the district aforesaid, before the Honorable George M. Dallas, judge of the said court, the 13th and 14th days of December, 1897, the aforesaid issue between the said parties came to be tried by the said judge, under an agreement and stipulation, filed of record (*pro ut* the same), at which day came as well the said plaintiffs as the said defendant, by their respective attorneys; and upon the trial the counsel of the said plaintiffs and of the said defendant did offer testimony as follows, to wit:

Counsel for plaintiff offers in evidence four memoranda of agreement, signed by plaintiff and defendant, all dated August 25, 1893, one for the sale and delivery of one hundred bales prime Pacific hops of the crop of 1896, to be shipped twenty bales each month, in the months of March, April, May, June and July.

Another, for one hundred bales similar hops of the crop of 1896, deliverable twenty bales each month in October, November, December, January and February.

Another, for one hundred bales similar hops, crop of 1897, deliverable twenty bales each month in the months of March, April, May, June and July.

Another, for one hundred bales similar hops, crop of 1897, deliverable twenty bales each month in the months of October, November, December, January, and February.

The price named in all these memoranda is twenty-two cents per pound.

Said memoranda are as follows:

32 *Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that the par*ties* of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the par*ties* of the second part, other hops, in fulfillment of this agreement, and par*ties* of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that the par*ties* of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

33 Time of shipment 20 bales each month, October, November, December, January and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of

their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision,
submit samples or tender delivery to the parties of the second
34 part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila lelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the

party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time for shipment 20 bales each month, October, November, December, January and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Counsel for plaintiff calls for production of letter Horst Bros. to John Roehm, dated June 23, 1896. Same produced, as follows:

"JUNE 23, 1896.

DEAR SIR: We beg to inform you that the partnership of Horst Bros. has been this day dissolved.

Respectfully yours, HORST BROS."

35 Counsel for plaintiff also reads in evidence letter dated Sacramento, California, June 24, 1896, which will be found at close of testimony.

Also letter from defendant to plaintiff, in reply to said letter, as follows:

"JUNE 27, 1896.

Messrs. Horst Brothers, 42 Pearl St., New York city.

DEAR SIR: Yours of the 23d inst., notifying me of the dissolution of the copartnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific hops of the crop of 1897, which of course you cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability, on your part, to comply with the contracts.

Yours truly, JOHN ROEHM."

Counsel for plaintiff- calls for letter dated July 3, 1896, Horst Bros. to Roehm, same produced as follows:

"NEW YORK, *July* 3, 1896.

Mr. John Roehm, 856 Charlotte St., Phila., Pa.

DEAR SIR: In answer to yours of the 27th ultimo, we beg to say, that you have misconstrued the meaning of the notice of dissolution sent out by us to the trade. Its meaning was simply that no new contracts would be made and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claim; it does not ask for any release or discharges, and will punctually live up to all the contracts which it has made with you.

Yours respectfully, HORST BROS.,
In Liquidation."

Counsel for plaintiff- also reads in evidence the following letter:

"SAN FRANCISCO, *Sept.* 3, 1896.

Mr. John Roehm (brewer), Philadelphia, Pa.

GENTLEMEN: We refer you to your hop contract dated August 25, 1893. Mr. Paul Horst, who, with the members of the present firm of Horst Bros., comprised the former firm of the same
36 name, has assigned in writing to the present firm of Horst Bros., all his interests in the above-named contracts, and Mr. Paul Horst, aside from his liability to you for the proper performance of the contracts on our part, is no longer interested in the same, you will please therefore address to this our San Francisco office, any correspondence and wishes you may have relative to the same.

We assure you that the deliveries will be punctually and properly made and we will make every effort to please you in all matters pertaining to the same.

Wishing at all times to be at your service, we are, gentlemen,
Very truly yours, HORST BROS."

Counsel for plaintiff- also reads in evidence the following letter:

"SAN FRANCISCO, *Sept. 4th*, 1896.

Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery at New York, and, as we ship direct from this coast, we can ship to either city for same rate. Consequently, there will be a saving to you in freight if we ship to your city direct from here.

Awaiting your reply, we are,
Very truly, HORST BROS."

Counsel for plaintiff- also reads in evidence the following letter:

"PHILADELPHIA, *Sept. 14th*, 1896.

Messrs. Horst Brothers, San Francisco, California.

DEAR SIRS: In response to your letters dated 3d and 4th inst.,

state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

Very truly, JOHN ROEHM."

Counsel for plaintiff also reads in evidence the following letter:

37 "The Western Union Telegraph Company.

SAN FRANCISCO, *Sept.* 21*st*, 1896.

Jno. Roehm, 856 Charlotte St., Phila.:

Referring your letter fourteenth answering ours fourth—please wire our expense of what style hops you wish samples, also whether we shall make deliveries Philadelphia instead of New York.

HORST BROS."

Also letter dated September 21, 1896, affirming same.

Also, letter dated October 9, 1896, Horst Bros. to Roehm, as follows:

"SAN FRANCISCO, *Sept.* 21, 1896.

Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: We acknowledge receipt of your favor of Sept. 14th, and answered today by telegram as follows:

'Referring your letter fourteenth answering our fourth—please wire, our expense, of what style hops you wish samples—also whether we shall make deliveries Philadelphia instead of New York.'

We confirm the above.

Very truly, HORST BROS."

"SAN FRANCISCO, *October* 9, 1896.

Mr. John Roehm.

DEAR SIR: We enclose you herewith invoice and B L covering shipment of 20 bales sold for October shipment under your contract dated August 25th, 1893.

We will thank you to place the amount of invoice, $802.76, to our credit.

You will notice that the shipment is made to New York and that the railroad company will deliver the hops at New York subject to your order. We wrote you on September 4th and wired and wrote you on September 21st, asking you whether we might make the shipment to you at Philadelphia instead of New York, free of expense, but we received no reply from you thereto; therefore, we have made the shipment to New York as per contract, and you will please give the railroad company any further instructions regarding the hops.

We have made you a very fine shipment and we know that you will be very much pleased with the quality of the same.

Very truly, HORST BROS."

38 Also, telegram, defendant to plaintiff, dated October 24, 1896, as follows:

"Horst Brothers, San Francisco:

I decline to receive shipment hops October 9th. Particulars by mail."

Also, letter, defendant to plaintiff-, dated October 24, 1896, as follows:

PHILADELPHIA, *October* 24, 1896.

Messrs. Horst Bros., 220 California St., San Francisco, Cal.

GENTLEMEN: Yours of October 9th enclosing bill of lading and bill of particulars for twenty bales of hops, forwarded me under the terms of contract of August 25, 1893, was received and I have wired you that I decline to receive the same.

I notified you under date of June 27, 1896, that owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere.

I am advised that I am under no obligation by that contract to accept supplies from you.

If you desire to bill these goods at the current market rates, under a new contract, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

Very truly yours, JOHN ROEHM."

Also letter dated October 31st, 1896, from R. O. Moon, counsel, as follows:

"OCTOBER 31, 1896.

Messrs. Horst Brothers, 122 Battery St., San Francisco, Cal.

GENTLEMEN: Your favor of October 23d, addressed to Mr. John Roehm, of this city, enclosing communication of Paul R. Horst, was this day handed to me by Mr. Roehm.

I have advised Mr. Roehm upon all the facts of this case; that his contract with you ceased to be binding upon him at the
39 time of dissolution of the copartnership with which he contracted, and acting under my advice he has declined to accept the consignment of hops recently forwarded by you.

Very truly yours, R. O. MOON."

Also, enclosed therein, letter dated New York, July 1, 1896, as follows:

"Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: I have assigned to Louis A. Horst and E. Clemens Horst all my right and interest in the hop contracts made by Horst Brothers with your good selves and dated August 25th, 1893.

Very truly, PAUL R. G. HORST."

Also letter, R. O. Moon, dated October 24, 1896, to Paul R. Horst, New York city, as follows:

"OCTOBER 24TH, 1896.

Paul R. G. Horst, Esq., 42 Pearl St., New York city.

DEAR SIR: I am instructed by my client, Mr. John Roehm, of this city, to notify you, in confirmation of his communication of June 27th, that, for reasons therein stated, he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

I have advised him, upon an examination of all the facts surrounding this case, that he has a right to terminate this contract.

Very truly yours, R. O. MOON."

Also letter, October 31st, R. O. Moon to Horst Brothers, San Francisco, as follows:

Messrs. Horst Bros., 122 Battery St., San Francisco, Cal.

GENTLEMEN: Your favor of October 23d, addressed to Mr. John Roehm, of this city, enclosing communication of Paul R. G. Horst, was this day handed to me by Mr. Roehm.

40 I have advised Mr. Roehm upon all the facts of this case; that his contract with you ceased to be binding upon him at the time of dissolution of the copartnership with which he contracted, and acting under my advice he has declined to accept the consignment of hops recently forwarded by you.

Very truly yours, R. O. MOON.

Also letter, F. P. Prichard to R. O. Moon, dated May 11th, 1897; letter November 5th, 1897, to Moon & Dickson, from F. P. Prichard, calling attention to said letter of May 11th, 1897; letter without date, addressed to F. P. Prichard, as follows:

"Replying to your notification of recent date in above matter that you had on hand certain hops ready for delivery, I write to say that under existing conditions Mr. Roehm must decline to receive them.

Very truly yours, R. O. MOON."

Counsel for plaintiff also offers and reads in evidence depositions of E. Clements Horst, T. B. Lovedale, Henry Gerber, Charles Schmidt, Rudolph Whittenbrock, H. Uchtmann, T. A. Livesly, and Kola Neis.

LORENZO D. JACKS, having been duly sworn on behalf of plaintiffs, was examined as follows:

By Mr. PRICHARD:

Q. What is your occupation?

A. I am a travelling man for Horst Bros., hop dealers—the firm that succeeded the plaintiffs in this case.

Q. Are you still in their employ?

A. Yes, sir.

Q. You have, I believe, sent in your resignation, and are about leaving their employ?

A. I have on account of ill health, but it has not yet been accepted.

Q. What has been your experience in buying and selling hops—how many years' experience have you had?

A. About five years.

Q. How large an experience have you had in that time; where have you bought and sold, and to what extent?

A. I have bought in New York State, and on the Pacific coast. I have sold all over the United States; that is, in every principal city in the United States.

41 Q. Have your sales been in large lots?

A. Yes.

Q. Can you give some idea of their aggregate extent per year?

A. I cannot, without looking over my books.

Q. They amount, I suppose, to many hundred bales, do they not?

A. Yes, to hundreds of bales.

Q. When would the crop of 1896, of the Pacific Coast crop of hops, be delivered under the ordinary usages of trade?

A. The crop is harvested on the Pacific coast about the last of August.

Q. In a contract made for the delivery of hops of the crop of 1896, where the articles are delivered in the months of October, November, December, January, and February, what months would those refer to?

A. If it was the 1896 crop it would be delivered in the same year, commencing October, 1896.

Q. In this case there are two contracts for the crop of 1896, one deliverable in the months of October, November, December, January, February, and the other in the months of March, April, May, June, and July, no year being stated. If it was the crop of 1896, and was harvested from August to October or November, then the delivery of those would be in the succeeding months?

A. Yes.

Q. That would make the months of October, November, December, January, and February, 1896 and 1897, and the months of March, April, May, June, and July, 1897?

A. Yes, sir.

Q. What was the market price of prime Pacific Coast hops of the crop of 1896, deliverable say in twenty-bale lots, commencing October, 1896, deliverable October, November, December, January, February, March, April, May, June, and July?

(Objected to, as to any testimony in this case after suit brought which was in December, 1896.)

The COURT: This case being tried without a jury the question will be reserved.

The WITNESS: About seven to seven and a half cents.

By Mr. PRICHARD:

Q. What would be the fair market price on October 24th, 1896, in New York city, for hops of the crop of 1897, or on a contract

for hops of the crop of 1897, to be deliverable in twenty-bale lots in ten successive months commencing October, 1897?

(Objected to.)

42 A. For prime Pacific Coast hops, about eight and a half cents.

Q. Please state whether or not it is a common and usual practice of the hop trade to sell hops for future delivery out of future crops.

A. Yes, a very common thing. I would like to change my answer made awhile ago. I stated seven and one-half cents. I did not count the freight. With that it would be about eight and a half.

By Mr. DIXON:

Q. When you answered as to the crop of 1896, and said that it was from seven to seven and one-half cents, you were then giving the San Francisco price?

A. I was giving seven and seven and a half the New York price in the year 1896, about October. That would be the market price for prime Pacific Coast hops in New York.

By Mr. PRICHARD:

Q. You have said that it was not unusual to make contracts for hops to be delivered in the future, out of future crops. Would a man experienced in the trade be able to quote prices, and is it a usual thing to quote prices to a purchaser who asks for such a contract?

(Objected to; the question should be, Is there a fixed market price?)

Mr. PRICHARD: I propose to show that it is an ordinary and usual thing for hop dealers to make contracts such as the contract in question here.

(To the witness:) You understood my question, did you not, in relation to the practice of making contracts for future delivery, to mean contracts which look to the actual delivery of the hops?

A. Yes.

Q. Of course I did not mean, by my question, to include what they call, I think, in Chicago, in grain contracts, option contracts, but my question was whether it was not a usual and customary thing to make contracts for the actual delivery of future hops out of future crops.

A. Yes, sir. That is the way I understood your question.

Q. It is a common thing in the trade for hop merchants to have applications from customers to quote prices for such future deliveries, and to quote prices for such future deliveries?

A. Yes, sir.

Q. What is the difference between the market price of Pacific Coast hops in San Francisco, and the market price in New York?

A. The difference would be about the difference in freight, which is a cent and a half.

Q. Is it or is it not a fact that most of the large dealers in New York who deal in Pacific Coast hops, also deal in San Francisco?

43 A. Yes.

Q. Is that the case with the plaintiffs here?

A. Yes, we have a house in New York, a house in San Francisco, one in Salem, Oregon, one in Washington, and one in England.

Cross-examination.

By Mr. Moon:

Q. I understand you to say that you are at present employed by the plaintiff firm, Horst Bros.?

A. Yes, sir.

Q. I also understand you to say that you have been engaged in this business how many years?

A. About five years.

Q. Do you mean in your present position of buying and selling hops?

A. Yes.

Q. Do you as agent for Horst Brothers purchase hops on the Pacific coast?

A. Yes.

Q. And also sell them to the trade here?

A. Yes.

Q. Recalling your attention to the market price of hops of the crop of 1896 about October, and the following months of the year 1896, what basis have you now for saying that the price of hops on October 24, 1896, of the crop of 1896 was about seven to seven and a half cents in New York?

A. I base that statement upon my own experience in selling, and coming in contact with brewers all over the United States, with other dealers, and conversations with them. There were instances where brewers showed me correspondence from other dealers offering hops at those prices.

Q. Have you any record of any sales made by you of prime Pacific Coast hops of the crop of 1896 during the month of October, 1896, for the price that you have named?

A. I can get that record.

Q. You have not got it now?

A. No, sir.

Q. And you are not testifying now based upon an examination of any record of that kind?

A. Yes, but I can't give you the exact date. It was in the month of October.

Q. There were fluctuations in the price of hops during the

44 month of October, 1896, and particularly in the month of November, was there not?

A. There was fluctuation, yes. Hops advanced along about November.

Q. Did not the price of hops in the latter part of October, and during November and December, advance very materially?

A. It advanced considerably.

Q. Is it not true that prime Pacific Coast hops were selling at that time at prices ranging from thirteen to fifteen cents a pound?

A. No, sir; we did not get any such prices for hops.

Q. Do you mean to say that they were not sold on the market by large dealers in large quantities at prices about like those during those months?

A. I sold in the month of November, I think, at eleven cents strictly prime hops.

Q. I think it is important that we should have an understanding about the grade of hops. It has been testified here by the depositions that the classifications were choice, prime, medium, and common. Those are the general classifications recognized in the trade, are they not?

A. Yes. There are common, medium, prime, choice, and fancy.

Q. Take the designation choice Pacific Coast hops. There is a pretty wide divergence, is there not, within the range of that one term; that is, no two persons would necessarily say absolutely that the same hop was choice?

A. That would depend on their experience.

Q. Is there not a wide range of quality, even under the term choice? There is a better choice, and a poorer choice, is there not? There is a choice that would take the highest standard, and one that would merge down toward the dividing line to medium, is there not?

A. We do not classify them that way in the market. They are either choice, or fancy, or prime, common, or medium.

Q. But the standard is not an absolute standard, absolutely unvarying?

A. Yes, sir; I think it is in the market.

Q. The judgment, skill, and experience of the dealer has to come in to make that classification, has it not?

A. Yes, sir; certainly.

Q. I repeat, is there not, in the designation of choice hops, a difference of grade, although under the same name—that some would be better than others?

A. If a lot of hops is graded choice I do not know that you could make any different grade out of it.

45 Q. You would expect to sell the hops for choice?

A. Yes.

Q. Are you an expert at all in the selection of hops?

A. Yes, sir.

Q. Did you ever have any experience in taking a large lot of hops and dividing it into the various grades?

A. Yes, sir.

Q. Do you never have any difficulty at all in telling that a particular bale of hops is all perfectly choice, or all prime?

A. Well, it is difficult, but at the same time——

Q. You are expected to do it?

A. Yes.

Q. But it is difficult?

A. Well, it depends upon your experience, and your knowledge of hops. In the case of the man with very little experience or knowledge of hops it would be difficult.

Q. Supposing that he had experience, and had knowledge of hops, are there not a great many hops that occupy the boundary line between the two?

A. For a man who has a good knowledge of hops it is very difficult to fool him on a choice lot of hops.

Q. And therefore it depends on his skill and experience in selection?

A. A man with any knowledge of hops whatever, you would hardly ever fool him on a choice or prime lot of hops. That is, a man in the hop business, buying and selling hops for any length of time, who makes a study of it. Where he spends his money for hops he certainly knows what he is buying.

Q. Wouldn't it depend on the extent of his experience and knowledge?

A. He has to have some experience before he can grade hops.

Q. What is true with regard to choice is also true with regard to prime?

A. What is true of the one would be true of the other. Hops are classified as common to medium, prime to choice, and choice to fancy. That's the way we classify them in the market.

Q. When you have been speaking of the price of hops, seven and a half cents a pound, sold in New York in October, 1896, of the crop of 1896, you mean Mr. Horst's gradation known as prime hops—that is, the party for whom you were selling?

A. Yes; I speak of prime hops—what I call prime hops—my opinion of prime hops.

46 Q. In other words, what Horst Brothers' opinion of prime hops was—that is you were selling for Horst Brothers, and you were selling their product?

A. Yes, sir.

Q. You were selling, therefore, their classification?

A. Yes, sir.

Q. In November you sold hops as high as eleven cents a pound Have you any recollection of December?

A. No, sir.

Q. Have you any recollection of January, 1997?

A. I do not know, but I think I sold them in January, 1897, eleven cents.

Q. Have you any definite recollection about it at all?

A. No, sir.

Q. Then it is purely a matter of memory, trying to recall sales?

A. Yes, sir; I can give you a record of those things in a short time, if it is necessary.

Q. Do you remember whether in the month of January, 1897, there was any difference between the beginning and the close of the month?

A. I think hops were less towards the latter part of the month than the first of the month.

Q. Is that a matter of certainty, or argument in your mind?

A. It is simply my remembrance of going among brewers and selling hops. I remember offering them cheaper. I do not think I sold very many. I did not sell any in the month of February, but was offering them for less money.

Q. Don't you remember that prime Pacific Coast hops of the crop of 1896 were about fifteen cents a pound?

A. No, sir; I offered them at nine and a half cents in February, I remember distinctly—sent a circular out among the brewers.

Q. Do you keep those circulars?

A. No, sir.

Q. Did those circulars designate them as prime Pacific Coast hops of the crop of 1896?

A. I may have the circular with me (examining). I find I have not got it.

Q. Do you remember about the month of March, 1897?

A. I did not sell any in March. I remember what my offers were to brewers over the country.

Q. Why do you remember that?

A. I have very good occasion to remember it. I tele-
47 graphed Mr. Horst from Chicago in relation to a certain lot that Jackson Brewing Co., of Cincinnati, had made me an offer on prime Pacific Coast hops five cents.

Q. Did you accept that offer?

A. No, I asked six and a half.

Q. Your offer to sell them in March, 1897, was at six and a half cents a pound?

A. Yes.

Q. Referring to future contracts, a contract for the sale and delivery of the 1897 crop made in the months of March, April and May, would mean a delivery in March, April and May, 1898. They are not picked until the latter part of August.

A. They begin about the latter part of August.

Q. Therefore, a delivery of 1897 hops to be made in March, April and May, would mean March, April and May, 1898?

A. Yes, sir.

Q. Do you mean to say that in October, 1896, there was any recognized market price for hops to be delivered in March, April and May, 1898?

A. Do you mean for future contracts?

Q. I do. Was there a recognized market price?

A. I couldn't say that there was a recognized market price; that is, one that we went by.

Q. In other words, each man would take the venture, and run the risk of making a price upon his own responsibility, would he not?

A. Of course there were prices that hops were selling at at that time—future contracts being made at certain prices, by other dealers.

Q. Each man would make his own contract—that is, is he attempted to sell futures?

A. No, there was a recognized price, because I call to mind now two firms who had made contracts for future hops at a certain price.

Q. It was a purely speculative contract, because you could not tell anything at all about what the amount of the yield was going to be in 1897?

A. No, sir.

Q. No one could tell that?

A. No, sir.

Q. No one could tell the results of the crop, or its condition, how it might be cured, the state of the weather, and other contingencies. Of course I do not mean to ask that question, as it would be impossible that any one could know, and it therefore would be purely speculative?

48 A. We can only tell from our experience in the business at what prices we can make future contracts.

Q. There was no quotation on the market anywhere of hops of the crop of 1897, in 1896?

A. No, but there were dealers making contracts with growers, and they were making contracts with brewers, and their prices were ranging at that time for the future at from eight to nine cents.

Q. That is what you were offering?

A. No, sir; that is what others had made contracts for.

Q. How do you know?

A. I know from men who told me they had made contracts.

Q. And that is all you know about it?

A. Parties who had made contracts with dealers told me that.

Q. You did not see the contracts made?

A. No, sir.

Q. There were regular market quotations of the market prices of hops of the crop of 1896, in October, 1896?

A. Yes, there were quotations for 1896.

Q. Those quotations, like all others, were indications of the market value on the particular days; in other words, they were the market prices, were they not?

A. I did not consider it so in 1896.

Q. Why not?

A. I was not selling hops at the prices quoted.

Q. Are not the quotations published in the recognized Trade Journal the prices for which hops are sold upon the market for that day?

A. They should be, but I do not find it so.

Q. In 1896 you did not find it so?

A. No, sir.

Q. Did you have frequent occasion in 1896 to know differently?

A. I had occasion to look at the journals. We took one monthly.

I took the journals monthly, and noticed the course, and I was getting no such prices as were quoted.

Q. What journal did you take?

A. The Brewers' Journal was one.

Q. Is that a recognized journal that gives quotations of the hop market?

A. I could not speak about that, but I think it is as good as any of them.

Q. Do you mean that the Brewers' Journals gave higher prices for hops than they were actually buying them themselves?

49 A. I say that the prices quoted in the Journal for 1896 were higher than the prices I got for the hops I sold.

Q. In other words, the purchasers of your hops, and the consumers, in their trade paper, were quoting prices larger than you were able to sell for?

A. I do not know that they quoted those prices.

Q. You say they appeared as their quotations in the Brewers' Journals?

A. They were prices maybe quote- by the dealers.

Q. Is it true that the Brewers' Journal, the trade paper of the consumers of your goods, quoted prices higher than you were able to sell them for?

A. Yes, sir.

Q. Was that true of the month of October, 1896?

A. Yes, sir.

Q. Was it true of any other month?

A. Yes, sir. I do not think I have ever been able to sell hops, either in 1896 or 1897, at the prices quoted in the Brewers' Journal.

Q. Did you notice any other journal?

Q. I do not know that I did. Probably I have.

Q. That is the only one that you can refer to now?

A. Yes, sir.

Q. That was a monthly journal?

A. Yes, sir.

Q. Don't you know that they have in the city of New York a paper that is the recognized standard for the hop trade, and that it quotes prices daily?

A. I know that there are several papers published there, but I do not know that it is considered a recognized authority.

Q. You do not know that it is not, do you?

A. No, sir.

Q. The only one that you have any knowledge of, as a hop dealer, was the Brewers' Journal?

A. Yes. I have probably seen quotations in the newspapers.

Q. Do you recall any particular one that you used to look at?

A. No. I know when I was on the coast in 1896 I noticed the newspapers there.

Q. Do you know that the Journal of Commerce and the Commercial Bulletin quotations are not recognized by any hop trade as the prices governing the market?

A. No, I do not know that.

50 Redirect examination.

By Mr. PRICHARD:

Q. There was one question asked you which I do not think you answered. You were asked whether prime Pacific Coast hops were not selling in the latter part of the month of October, 1896, in the trade for thirteen cents a pound in New York city. You said you were not selling, but I do not think you answered the question directly.

A. I do not think they were selling for that. No, they were not selling for that price—prime Pacific Coast hops.

Q. What were they selling for, if you know?

A. Prime Pacific Coast hops in the latter part of October, 1896, in New York, were selling for not to exceed eight and one-half cents.

Q. Mr. Moon has asked you about newspaper quotations. How long have you been engaged in buying and selling hops?

A. About five years.

Q. Has your business brought you in contact with many other people engaged in the same line?

A. Yes, sir, continually. Most every day I meet people.

Q. Are you able to say whether or not newspaper quotations are considered, by people who buy and sell hops, as much indication of the market price?

A. My experience and opinion is that I do not consider them to be a standard to go by.

Q. How do you find out what the market price of hops is?

A. They way to find out the market price of hops is to go to the brewers and try to sell to them. Then you get the market. When you want to buy them you go to the grower, and offer him a price for them.

Q. How do you find out what other people are offering to buy them at?

A. By coming in competition with them.

Counsel for plaintiff- offers in evidence two letters, plaintiff- to defendant, dated September 18, 1896, and September 27, 1896, referred to in the deposition of one of the plaintiffs, offering hops at seven and three-quarters cents a pound.

Plaintiff- rests.

Defendant's Testimony.

JOHN ROEHM, having been duly sworn, was examined as follows:

By Mr. MOON:

Q. You are a resident of the city of Philadelphia, and the defendant in this action?

51 A. Yes, sir.

Q. Had you, prior to August, 1893, purchased hops from the firm of Horst Brothers, located in New York and San Francisco?

A. Yes, sir.

Q. On August 25, 1893, you entered into these contracts, and your signature is upon them?

A. Yes, sir.

Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

NOTE.—All objections for relevancy upon either side are reserved until final argument.

Q. What was your method of doing business—did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making these contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers, through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert
52 man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you, and to your trade?

A. Some of them were.

Q. Had you ever had any difficulties at all respecting the quality of the hops with Horst Brothers prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q. Had Paul Horst always made those matters right?

A. He always made them right.

Q. The correspondence which has been read by Mr. Prichard was dictated by you, or authorized to be sent by you?

A. Yes, sir.

Q. You acted under advice of counsel? You did not receive the hops sent in pursuance of these contracts for the reasons which you have given in the correspondence?

A. No, sir.

Q. Did you buy hops of this same grade and quality to supply the deficiency occasioned by your failure to receive these hops?

A. Yes, sir.

Q. That is, you bought hops of other people to supply your wants at that time?

A. Yes, sir.

Q. Of whom did you purchase hops?

A. I bought a great many hops from different people.

Q. Did you buy any from Paul Horst?

A. Yes, sir.

Q. He himself entered into business as a rival to the old firm, did he not?

53 A. Yes, sir.

Q. Do you remember when you bought hops of Paul Horst?

A. In 1897.

Q. What time?

A. January and February.

Q. Do you know whether you bought the same kind and quality of hops of Paul Horst that you had been supplied under contracts previously by Horst Brothers?

A. I bought from Paul Horst in January and February.

Q. How did the quality of those hops compare with the hops that you had received under the old contracts with Horst Brothers?

A. They were very fair.

Q. State the quality of the hops you got from Paul Horst in January, 1897, and the quality of the hops that you had received from Horst Brothers under your contracts in January, 1896.

A. First-class goods.

Q. Do you remember the price you paid for those hops in January, 1897?

A. Yes, sir; thirteen cents.
Q. For this same grade and quality of hops?
A. Yes, sir.
Q. Did you have any conversation with Paul Horst about the time, respecting this suit and these contracts—that is, after the suit was brought?

(Objected to.)

A. Yes, sir.
Q. Where did that conversation occur?
A. Right in my office.
Q. What, if anything, did Paul Horst say with regard to these contracts?

(Objected to.)

A. When the partners split, each going for himself, then I received a letter from Paul Horst that each one would go for himself, and asking if I was on the market for good hops.

Letter called for and handed to Mr. Prichard.

Q. (Handing letter to witness.) Is that the letter that you received from him on July 8th?
A. Yes, sir.
Q. I call your attention particularly, however, to a conversation which you said occurred between you and Mr. Horst respecting these contracts in suit. What did he say about his interest in them?

54 A. When I received the letter, though I don't remember the date—he came here himself after I got the letter—came to my office. He said that over again—he said that the partners not agreeing each one went for himself—he said that he and the other members of the firm in the division of these contracts put slips in a hat to draw numbers to see who would get the contracts, and Clements Horst drew my contracts.

Q. What did he say about his drawing the contracts of other parties?
A. He said to me, "You can buy where you please; you are not staying under any obligations; you can buy at market prices."
Q. Was there anything said at that conversation, or at any other conversation, about the use of the name Horst Brothers?
A. He said the name was not to be used any more.

Cross-examination.

By Mr. Prichard:

Q. How many contracts had you made with Horst Brothers prior to this one of August, 1893?
A. A five years' contract.
Q. Had you another five years' contract before that?
A. No, sir, no contract at all.
Q. How many years had you bought from them?
A. Three years before I made the contract.

Q. How many times had you seen any of the Horsts in that time?

A. I saw Clements Horst once.

Q. How many times did you see Paul?

A. I saw him every month; sometimes twice a month.

Q. Paul Horst was the one who was in New York, was he not?

A. Yes, sir.

Q. Clements Horst was the one in San Francisco?

A. I don't know where he was. I couldn't tell you.

Q. In August, 1893, you made a five years' contract for your hops at twenty-two cents a pound?

A. Yes, sir.

Q. At that time these four pieces of paper were signed, were they not?

A. Yes, sir.

Q. There were six other pieces of paper for the previous three years?

A. Yes, sir.

Q. Which one of the Horsts signed that contract?

55 A. Clements.

Q. Where was it signed?

A. In my office.

Q. Then you actually made this particular contract with Clements Horst?

A. Paul Horst went to England, and he sent his brother over here to make contracts with me. I didn't want to make any contracts with him at all, because I didn't know him. He said, "You can trust me, because he is my brother." "Well," I says, "if you are as good as your brother, I will depend on you." That's the reason I signed the contract.

Q. The practice was under that contract, was it not, for them to send you before each shipment a sample of the hops which they intended to ship to you?

A. They did.

Q. Then you examined that sample, and said to them either that it was sufficient or that it was not sufficient?

A. Yes.

Q. If you thought that it was not good enough you sent it back and said it wouldn't do?

A. We found out when his brother went away, that is, when Paul Horst went away, they sent goods that were not good goods. As long as Paul was home we all the time had good goods. When he wasn't home I had lots of trouble with them—especially when he himself went away.

Q. Before each shipment you required them to send a sample?

A. He only sent me samples once. They didn't send samples any more, and I sent the hops back again. That was especially when his brother was away.

Q. When did he send you a sample and you send the hops back again?

A. In 1895.

Q. Hops under the five years' contract?

A. Yes.

Q. Did you get another sample?

A. No samples. He didn't send any samples. He didn't pay any attention. I would write him "I don't want those hops, because they are not good." He sent me twenty bales, and they were not much satisfaction. I sent them back again.

Q. How did you find out whether they were good or not?

A. We sent a sample over to the New York expert, cut pieces out of the bags, and had the hops examined by the expert.

56 Q. Do you do that on each shipment?

A. Yes, sir.

Q. You always did that—every shipment?

A. No, sir; not all, but most of them.

Q. When hops arrived you took a sample and sent it to your sampler in New York, and he would report to you whether they were right, or not?

A. The first thing I got an expert brewer to sample the hops.

Q. If he did not approve of them you would send them back?

A. Yes, sir; to New York.

Q. You would require new hops to be sent in their place?

A. Yes, sir.

Q. Mr. Jacks was the man who in 1895 selected hops sent to you under these contracts?

A. I don't know that man at all.

Q. Do you remember a time when Mr. Jacks came on and sold you ten other bales of hops in the spring of 1896?

A. No, sir; I don't know that I ever saw that man.

Q. After the letter from Paul Horst you received a letter from Louis & E. Clements Horst dated July 18, 1896, did you not?

A. Yes, sir.

Q. That letter reads, "Since sending our circular of June 24, 1896, we have seen a circular sent out by our brother and former partner, Mr. Paul Horst, wherein he represents himself as having been the senior partner of our former firm. This statement is untrue. The former partnership was composed of three equal partners," etc., etc. Now you say you have bought hops of Paul Horst in January, 1897?

A. Yes, sir.

Q. Did you buy any hops in October, 1896?

A. No, sir.

Q. Where did you get your supply of hops between October, 1896, and January, 1897?

A. Most hops I got from Paul Horst.

Q. Between October, 1896, and January, 1897?

A. Yes, sir.

Q. Then you bought hops of him before January, 1897?

A. Yes, sir.

Q. What months in 1896 did you buy hops from him?

A. I guess, December.

Q. Where did you get your hops that you used in October and November, 1896?

57 A. We had that much stock on hand.

Q. What did you pay Paul Horst for the hops that you bought in December, 1896?

A. Twelve cents.

Q. How many bales did you buy of him?

A. Sixty. Seventy-five, I guess.

Q. Did Paul Horst suggest to you the writing of this letter of June 27th, in which you say that you have received notice of the dissolution and that you considered the contracts at an end?

A. No, sir.

Q. But he did tell you that you were under no obligation to carry out that contract?

A. Yes, sir; that is what he told me.

Q. When you received from Horst Brothers the letter of September 4, 1896, asking you whether you wished them to ship you the hops under your contract to New York or to Philadelphia, why did you write them, "In response to your letters dated 3d and 4th inst. state that before shipping me any hops always send me samples from which I can select the same as you have been doing in the past"? Why was it, if you did not intend to carry out the contract, that you thus wrote?

A. Because Horst Brothers had given up their partnership, and I didn't pay much attention to it.

Q. But if they wrote you, saying that they were going to ship you hops, and asking you where you wanted them, whether in New York or Philadelphia, why did you reply asking them to send you samples?

A. I never did.

Q. I show you your letter of September 14, 1896. That is written on your letter paper, is it not?

A. Yes, sir.

Q. Who is it signed by?

A. My son.

Q. Where is he?

A. He is right here.

Q. What position did he hold in your place at that time?

A. Superintendent.

Q. Can you explain to the court how it was that your son, and your superintendent, wrote that letter of September 14, 1896, asking Horst Brothers to send sample, in reply to a letter which they had written saying they were going on with their contract?

A. I will tell you why. I remember when Horst Brothers

58 sent me a letter stating the dissolution of their partnership they sent me a sample at the market price.

Q. I think you are quite intelligent enough to answer my question. You have been engaged in a large business in the city of Philadelphia. I call your attention to the fact that on September 4, 1896, Horst Brothers wrote you about carrying out this contract, and asked you where you wanted hops delivered, whether in Phila-

delphia or New York, to which, on September 14, 1896, your son and superintendent, in a letter written on your letter-paper heading, wrote asking them to send sample. I ask you why it was that, if you considered the contract at an end, you allowed your son to write asking for samples?

A. I will tell you over again. When he sent me a letter asking why I didn't take their hops I told my son to write him to send a sample by the market price, and not by the contract.

Q. Do you find anything to that effect in the letter?

A. I do not.

Q. And you think that although you told your son to do one thing, he did another?

A. No, sir; he did just the same as I told him.

Q. You think he did what you told him?

A. Yes, sir.

Q. But as I understand you, you say you told him to write to send samples, not under the contract, but under the market price, and I have shown you a letter in which he writes to send samples, referring to the letters of the plaintiffs in which they allude to the contract. How do you reconcile that discrepancy with your last answer?

A. When that letter was sent I instructed my son. Of course I didn't look over it. He mailed it. That is all I know about it. I instructed him to send samples by market price, and not by the old contract price any more. So he sent the letter away.

Q. Did you instruct your son to write to them at that time that you would not carry out the contract?

A. Yes, sir.

Q. Notwithstanding that he wrote this letter?

A. I don't know anything at all about that letter. I didn't send that letter away.

Q. Did you ever reply to the letter of Horst Brothers to you dated July 3, 1896, in which they said that you had misconstrued the meaning of their notice of dissolution, and that their contract would be carried out?

A. No, sir.

59 Q. Can you tell the court why you did not answer that letter?

A. I didn't take much interest in it any more. When the partnership gave up I bought my goods where I wanted them.

Q. Hops in July, 1896, when you received the notice of dissolution were *they* much lower than they had been at the time you made the contract, were they not?

A. No, to my knowledge they were about twelve cents and thirteen. We paid that.

Q. And the contract price was twenty-two cents?

A. Yes, sir.

Q. Do you recollect Mr. Jack's offering you hops in September, 1896, at seven and one-half cents?

A. No, I don't know that man at all.

LOUIS H. WEHMEYER, having been duly sworn on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. What is your business?
A. Brewers' supplies and dealer in hops.
Q. You reside in the city of Philadelphia?
A. I do.
Q. How long have you been engaged in business?
A. About twenty years. I have been in business at least fifteen years, and I have been with my father.
Q. What do you mean by brewers' supplies?
A. That takes in odds and ends, bungs, kegs, etc.—different things. We handle hops.
Q. Do you sell them?
A. Yes, sir.
Q. Are you an extensive dealer?
A. We do a fair business, some years seventy-five to eighty thousand pounds, and some years not quite so many.
Q. Do you sell to brewers here in the city of Philadelphia, chiefly?
A. Yes, sir.
Q. Do you sell outside of the city?
A. Not very far. More local.
Q. Were you selling hops in the year 1896 of the crop of 1896?
A. Yes, sir.
Q. Are you familiar with the market prices in October, 1896, of hops of the crop of 1896?
60 A. Yes, sir.
Q. Are you familiar because you made sales, or what is the basis of your familiarity?
A. I was in New York State in 1896, in the hop country.
Q. I speak now about prime Pacific Coast hops of the crop of 1896. Were you familiar with the market price of such hops at that time?
A. Yes, sir.
Q. Did you make sales of hops of that kind at that time?
A. Yes, sir.
Q. State what the regular market price of prime Pacific Coast hops of the crop of 1896 was in the month of October, 1896.
A. In the month of October we did not sell many Pacific coast. Mostly State. In September, we did.
Q. Do you know about what the price of them was in the market?
A. Yes, sir.
Q. Does your position require you to be familiar with current market rates?
A. Yes, sir.
Q. What was the market price in October, if you know?
A. In the latter part of October we got ten to ten and a half cents for prime New York State hops. We did not sell any Pacific Coast hops in October. In November, we did.
Q. As a dealer of long experience are you able to say, if there is

any such thing recognized in the trade, the comparison between the price of State hops and Pacific Coast hops?

A. The average is about the difference in freight. That is, delivered in Philadelphia they run about the same.

Q. You say you made sales of prime Pacific Coast hops in the month of November, 1896?

A. Yes, sir.

Q. What did you get for them at that time?

A. We got as high as fifteen cents.

Q. What was the state of the market at that time?

A. The market was very excitable after election. Before election hops were around eleven and twelve cents. After that they run up. You could not touch them for fifteen.

Q. Did you make actual sales of prime Pacific Coast hops of the crop of 1896 in November, 1896?

A. Yes, sir; I think I did. (Examining.) Yes, I got fifteen cents in the latter part of November for prime Pacific Coast hops. I sold some from thirteen to fifteen cents.

61 Q. How were they in the month of December, if you remember?

A. About the same as November.

Q. Take now the months of January and February. What was the price in January?

A. The month of January averaged thirteen to fourteen. In February it got down around twelve cents. In March, April and May they kept going down all the time after that. The average drop was about the same.

Q. Do you remember how they were in March, April and May?

A. I can't tell you positively. I should judge they ran about eleven cents—in that neighborhood.

Cross-examination.

By Mr. PRICHARD:

Q. Who did you sell to for fifteen cents in November?

A. Different brewers here in the city.

Q. Let me see your memorandum?

A. I have just taken a list out of my book here. I have not got the names.

Q. How many bales were in the lots which you sold for that price?

A. They ran in lots of ten, fifteen, or five bales—some twenty.

Q. Where do you get your hops from?

A. Principally from New York State.

Q. Where do you buy your Pacific Coast hops?

A. I buy them on the market in New York city from the dealers.

Q. Almost all contracts for the sale of large lots of prime Pacific Coast hops are made for delivery in New York city, are they not?

A. Well, I don't know about that. If you make a contract in Philadelphia for delivery you want them delivered here.

Q. What is the largest lot of prime Pacific Coast hops you ever sold in your life?

A. I don't know that I can tell you. About twenty or twenty-five bales. Somewhere along there. I have bought as high as one hundred at a lot at one time—ninety-eight to one hundred.

Q. You went to New York to buy them?

A. Yes, on the market there.

Q. What do you know about the market price of prime Pacific Coast hops in New York city on October 24, 1896?

A. I should judge they were bringing in the neighborhood of ten cents.

Q. What do you know about it?

A. I was not in New York city at that time.

62 Q. You did not know as a fact what the price was at that time in New York city for such hops?

A. No, sir. We did not handle any at that time. I did not go into the market for them.

Q. Are you sure about what you say as to the difference between the market price of New York State hops and Pacific Coast hops—do you mean to say that they are about the same?

A. We got as much for one as we did for the other last fall.

Q. Are you sufficiently posted to state that in the trade the only difference between New York State hops and prime Pacific Coast hops is the amount of the freight?

A. About a cent and a half.

Q. I ask you whether you undertake to say that you have knowledge of the price of those hops in the trade which enables you to make that statement. Are you familiar with the current prices of New York State hops and prime Pacific Coast hops in New York city?

A. Yes, sir.

Q. Can you say that there is usually no difference between the prices of those two hops?

A. They may average a cent. Oh, yes; sometimes there is a difference of a cent or two one way or the other.

JOHN THOMAS, having been duly sworn on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. You are a brewer of the city of Philadelphia?
A. Yes, sir.
Q. You have been for some years?
A. Yes, sir.
Q. What was the name of your firm?
A. Welde & Thomas.
Q. Were you the buyer of that firm?
A. Yes, sir.
Q. Were you or not large consumers of hops?
A. Yes, sir, considerable.

Q. Did you buy hops in the months of November, 1896, and February, 1897, for consumption at your brewery?

A. Yes, sir.

Q. Of whom did you purchase them?

A. Carl Ullman and the Pacific Hop Company. I forget another party.

63 Q. Did you buy Pacific Coast hops?

A. Yes, sir; they were all Pacific Coast hops. They were choice hops.

Q. What did you pay for choice Pacific Coast hops in the month of November, 1896? (Bill shown witness.) Is that the bill?

A. Yes, sir; twenty-five bales at eleven cents.

Q. Did you buy them at the open-market price?

A. Yes, sir; I paid cash, two per cent. off.

Q. You paid at that time how much?

A. Eleven cents.

Q. Did you buy them in February, 1897?

A. Yes, sir; from the Pacific Hop Co.

Q. Those were also choice Pacific Coast hops, were they?

A. Yes, sir.

Q. What did you pay for them in February, 1897?

A. Thirteen and a half cents; two per cent. off for cash.

Q. Are you able to say from your experience what the difference is in the price of prime Pacific Coast hops and choice Pacific Coast hops?

A. I never would buy anything but choice. In fact I never made any inquiries about prime.

Q. Therefore you are not able to say about that?

A. No, sir.

Cross-examination.

By Mr. PRICHARD:

Q. Each of these lots was a twenty-five bale lot?

A. Yes, sir, and there was, I think one ten-bale lot.

Q. Did you buy any in October, 1896?

A. Not to my recollection.

Q. You buy hops for your own consumption?

A. Yes, sir.

Q. You are not a dealer in hops?

A. No, sir.

MYER GATTMAN, having been duly sworn, on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. What is your business?

A. Dealer in malt and hops.

64 Q. Do you reside in the city of Philadelphia?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. Six years.

Q. Have you been engaged here in the city most of the time?

A. All of the time.

Q. Do you sell direct to brewers and consumers of hops?

A. Yes, I act as salesman. I represent people in the trade.

Q. Whom do you represent in the hop trade?

A. Hugh F. Fox, of New York.

Q. How long have you represented that firm?

A. Five years.

Q. You sell direct to the consumers for that firm as agent?

A. Yes, sir.

Q. Are you familiar with the various grades of hops that are sold and consumed?

A. Yes, I have a general knowledge on the subject.

Q. There is in the market a hop known as a Pacific Coast hop, is there not?

A. Yes.

Q. Do you know the designation of a prime Pacific Coast hop?

A. Yes, sir.

Q. Do you know what the price of prime Pacific Coast hops of the crop of 1896 was in this market in the month of October, 1896?

A. I sold some in that month at prices ranging from ten to eleven cents—about an average of ten and a half cents.

Q. Are you speaking now about prime hops?

A. Yes, sir.

Q. What is the general range of difference between choice hops of the Pacific coast and prime Pacific Coast hops?

A. That would be a pretty hard thing to tell, because opinions vary so much as to what the quality of a hop really is. One man might call it a choice hop, and another man might call it prime.

Q. There is a wide divergence?

A. Yes, sir. It is not like grain, that has an established grade. You may show a sample of hops to one man, and he would think it was very fine, while another wouldn't look at it or like it at all, either from its flavor or appearance, and from many different things to a man's fancy.

Q. Does it require experience, skill, and knowledge to be able to grade hops between choice and prime and prime and medium?

65 A. Yes, I think so.

Q. Is there a wide divergence of quality, for instance, in the term prime?

A. Yes, there is quite a difference. One might be very good prime, almost choice, and one might be poor.

Q. One might be almost choice, and one might be almost medium?

A. Yes, sir. One might be so near choice that you couldn't tell the difference, and the other very poor, but still they might be called prime hops on delivery.

Q. You say you have not sufficient knowledge to be able to tell what the difference was between choice and prime hops?

A. As I have said before, there is a wide difference of opinion. Extra prime or choice might bring just as much as poor choice, because it would be hard to tell. Different men would have different opinions. You might get half a dozen men, and not any of them have the same opinion—no two of them.

Q. You say you sold prime Pacific Coast hops in October for from ten to eleven cents?

A. Yes, sir. The reason of that was that in the beginning of October the market was lower. It gradually stiffened as the month progressed.

Q. Do you remember about October 24th; can you fix definitely any date as to the time you sold these hops?

A. No, I couldn't say positively about the date. I know that in the early part of the month hops were cheaper than they were later. Well, I do know, too. I sold some at ten and a half cents on the 14th of October, and later in the month, about the 29th, I think it was, or somewhere along there, or anyway in the latter part of the month, at eleven cents.

Q. Can you state the prices in the month of November?

A. There was a sudden advance in November. Just before election they were selling at about eleven to twelve, and almost by the middle of November they were selling at fifteen. I sold some at fifteen.

Q. How about the price in December of that year?

A. They were a little easier than they were in November—probably a cent less—about fourteen cents.

Q. How about the first of the year?

A. In January they began to go down. I think in January they were worth twelve to thirteen cents, so far as I can recollect.

Q. What were they in March?

66 A. I couldn't tell you really, because I didn't post myself. I didn't know that I was going to be asked the market any later than that, and I didn't look it up. I know they were lower.

Q. You have made the particular investigation about which you were asked to testify?

A. Yes, sir; I referred to sales that I personally made.

Cross-examination.

By Mr. PRICHARD:

Q. You are speaking always in giving these prices of prime Pacific Coast hops?

A. Yes, sir. Well, prime to choice. As I looked at it they were just good brewing hops—about average quality.

Q. You know, do you not, that for very many years there have been recognized grades of Pacific Coast hops known as choice, and as prime?

A. Yes, sir.

Q. Quotations are so made?

A. Yes, they are quoted that way.

Q. Throwing aside extra qualities of prime or inferior qualities,

of choice, the average hop operator or seller has no particular difficulty in distinguishing those grades, has he?

A. Yes, because if you look at the quotations most any day you will see that hops are quoted—today—though I do not know the exact quotation—but from general experience, that there are variations in grades—there is no fixed standard—no one could say positively that such and such a grade was prime, or that such and such a grade was choice.

Q. That is to say, in giving quotations of hops, as of anything else, they usually give the minimum and maximum, from seven to nine, or from six to five?

A. Yes, something like that.

Q. But the highest quotations for prime are less than the lowest quotations for choice, are they not?

A. Yes, sir.

Q. I again ask you whether a person skilled in the trade has any particular difficulty in distinguishing between an ordinary choice and an ordinary prime hop?

A. No, if it was an ordinary choice. If it was near the same quality though, it would be difficult. It would be a subject of controversy between experts, even, as to whether it would grade prime or choice.

67 Q. Do you consider yourself an expert on the subject of grading hops and the prices of hops?

A. In a general way. I do not consider myself letter perfect. I do not think any man is.

Q. What do you deal in besides hops?

A. Malt.

Q. Anything else?

A. Yes, corn goods. Malt, hops, and corn goods—grits.

Q. How many bales of Pacific Coast hops do you handle in a year?

A. It varies. Some years from two hundred to as much as five hundred in one year.

Q. In 1896 about what was the total of your sales of Pacific Coast hops?

A. Between four and five hundred.

Q. Do you sell to brewers here in Philadelphia?

A. Yes, sir.

Q. Did you ever sell in New York city?

A. No, sir.

Q. Do you know anything about the market price of hops in New York city?

A. Yes, sir.

Q. Can you state what the market price of prime Pacific Coast hops was in New York city on October 24, 1896?

A. Only from quotations given me to sell by, which were usually about a cent a pound more than the New York price.

Q. You mean the prices that your principals sent you here as authority to sell?

A. Yes, sir.

Q. You had not a fixed price at which you sold?

A. No, sir.

Q. You got specific instructions from your principals that you could sell at such and such prices?

A. Yes, I offered at those prices. They were based of course upon market value.

Q. Did you, outside of the instructions that you received from your principals, have sufficient knowledge of the trade generally to be able to say what the ruling market prices were in New York on October 24, 1896?

A. Just what information I could get from the trade journals and papers, the Journal of Commerce, for instance, of New York, and the New York Tribune. As most business men do I
68 would keep myself posted as to the market price of articles that I dealt in. I couldn't do much business if I did not.

Q. But you only sold at prices given by your principals?

A. Certainly, at fixed prices. It was not my property.

Q. What number of bales did you sell on October 29, 1896?

A. I did not say I sold any on that date. I said about that time.

Q. When did you sell in October?

A. On the 14th of October I sold ten bales that I remember at fifteen cents.

Q. What kind of hops were those?

A. Those were choice Pacific hops. They were sold as choice.

Q. Did you not say in your examination-in-chief that you sold for nine and a half on the 14th of October, and that they went up subsequently?

A. No.

Q. Did you not say that they went up later in the month to a higher price, and that you sold about October 29th at that price?

A. No, sir; I don't think I have given any such testimony.

Q. Now you say that on October 14th you sold ten bales of choice Pacific at fifteen cents a pound?

A. Yes, sir. No. I have got that wrong. That was in November. I sold those at ten and a half cents. On the 29th, or about that time, I sold at eleven cents.

Q. What was it you sold at eleven—how many bales, and what hops?

A. I don't remember the exact number of bales. It was not a very large lot. I think it was ten or fifteen bales.

Q. What grade of hops?

A. Prime Pacific hops.

Q. Who did you sell them to?

A. I do not know that that is any business of the court's, or of yours.

Q. I want to test your recollection.

A. I know who I sold them to, but I do not think it is necessary for me to expose my business here. The reason I remember is that I have competitors in the business, and I do not care to expose my business to them. Another thing is, that a brewer buying from

me don't care to have every one know what he has been paying for his material, or who he is buying from.

Q. You think this was the ordinary market price, don't you?

A. Yes, sir.

Q. Do you think any customer of yours who bought fifteen
69 bales of hops could object to having it said that he bought at the ordinary market price from you?

A. I don't know whether he would or not.

Counsel for defendant offers and reads in evidence deposition of William Ullman.

Counsel for defendant also offers in evidence copies of Journal of Commerce giving quotations of prices for October 23 and 24, 1896, also during the months of March, April and May, 1897, and September, 1897. The report of Journal of Commerce and Commercial Bulletin, Saturday, October 24, 1896, gives Pacific Coast hops of 1896, choice, ten and a half cents per pound.

Medium to prime, seven to nine and one-half cents per pound.

October 26, 1896, same prices.

March 24, 1897, prime Pacific Coast hops, from ten to eleven cents.

April 24, 1897, prime Pacific Coast hops crop of 1896, from eight and a half to nine and a half cents.

May 24, 1897, for same, eight to nine cents a pound, being medium and prime.

July 24, 1897, prime Pacific Coast hops crop of 1896, medium to prime, eight to nine cents a pound.

October 25, 1897, medium to prime, from fourteen to fifteen cents a pound for Pacific Coast hops.

Mr. Wehmeyer states that in November, 1897, they were about the same as in October, 1897.

Defendant closes.

Plaintiff's Testimony in Rebuttal.

Mr. JACKS, heretofore sworn, further examined, as follows:

By Mr. PRICHARD:

Q. Mr. Ullman has testified that Mr. Lovedale has been connected in business, or has been connected with the plaintiffs in different hop deals in the last six or seven years. Is that so?

A. He has been connected in no hop deals, any more than we have sold his hops on commission.

Q. In reference to hops of the crop of 1897, what was the market price in November, 1897?

A. I sold hops last month, prime hops, Pacific, at eleven cents, delivered here.

70 Cross-examination.

By Mr. MOON:

Q. When you say that this man was not connected in any deals,

how do you know—you are not a member of the firm of Horst Brothers?

A. I have access to the books when I am there.

Q. You have not made any especial investigation of the books to see whether Lovedale was interested in any deals, have you?

A. I was there in the office two years, and had access to the books all the time.

Q. You charged hops that you sold, or collected money from people to whom you sold. You did not make an examination of all the records of the company, did you?

A. I think I made an examination of all the accounts kept with all the parties. I was often going over the books.

Q. Did you ever make a special examination of this matter?

A. No, sir.

Q. What do you know of what arrangements were existing between Lovedale and your employers, as to hop contracts?

A. If there was any partnership between them it would be shown on the books.

Q. There is no statement to the effect that any partnership existed between them at all. You do not know anything about what other arrangements existed between the two, do you?

A. If there was anything confidential between them I would not know, but anything of that kind would appear on their books, I think.

Q. Do you know anything about the books except what concerned your transactions with the firm?

A. I saw the books daily there whenever I wanted to look over them, and I saw no account with Lovedale.

Testimony closed.

Deposition of E. Clemens Horst.

E. CLEMENS HORST, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence and occupation.

A. My name is E. Clemens Horst; my age is 31 years; my occupation is hop and barley merchant. I am a citizen and a resident of San Francisco, California.

Q. Are you a member of any firm or copartnership?

71 A. I am a member of the firm of Horst Brothers.

Q. State the names and residences of the other members of the firm?

A. There is only one other member of that firm and his name is Louis A. Horst, who is a citizen of Chicago, Illinois.

Q. Formerly was any other person associated with you in business with Louis A. Horst?

A. Yes, sir; my brother, Paul Horst, a citizen of the city of Brooklyn, New York.

Q. How long have you been engaged in the hop business?

A. About ten years.

Q. Are you one of the plaintiffs in this action?

A. Yes, sir.

Q. How long have you and your brother, Louis A. Horst, been associated together in that business?

A. The present partnership has been running since June, 1896, though I have been associated with my brother during the last ten years.

Q. Prior to June, 1896, were your brother and yourself associated with anybody else?

A. Yes, sir; with my brother, Paul Horst.

Q. And in what business were the three of you engaged in prior to June, 1896?

A. In the hop business.

Q. As what?

A. As copartners, doing business under the firm name of Horst Brothers.

Q. That copartnership continued until June, 1896?

A. Yes, sir. After June, 1896, my brother, Louis A. Horst, and I continued together in business as Horst Brothers.

Q. Do you recall a contract entered into between the former firm of Horst Brothers and John Roehm?

A. Yes, sir.

Q. How many such contracts were there?

A. There were four contracts, that is, there were altogether ten contracts, six of which have been fulfilled and four of which have not been carried out. These being the four now in dispute.

Q. When the original firm of Horst Brothers dissolved in 1896, who succeeded to these contracts?

A. My brother, Louis A., and I succeeded to these contracts.

Q. The four contracts which you referred to as not having
72 been carried out, are they the same contracts that are the subject-matter of this action?

A. Yes, sir.

Q. From the time of yourself and brother, Louis A. Horst, succeeding to the contracts referred to in the complaint in this action were you at all times ready and able to perform the conditions of those contracts?

A. Yes, sir.

Q. Did you at any time attempt to perform either of those contracts; if so, which and when?

A. I made shipment of the first installment called for by this contract for one hundred bales of crop of 1896, of which twenty bales were to have been shipped or delivered during the month of October, 1896. I did ship twenty bales.

Q. And you shipped from where to where?

A. I shipped them from the Pacific coast to New York.

Q. What was the quality of the hops shipped by you?

A. Prime Pacific Coast hops of the crop of 1896.

Q. So you recollect the date of that shipment?

A. That shipment was October 8th, 1896.

Q. What was the weight of the twenty bales that were shipped by you—that is the weight per bale?

A. Those twenty bales weighed gross 3,991 pounds. The tare, according to the contract, was 70 pounds, and the net weight was 3,921 pounds.

Q. These twenty bales were shipped to whom?

A. To John Roehm.

Q. Where?

A. At New York city.

Q. Did they arrive there?

A. Yes, sir.

Q. Were they received by Mr. Roehm, the defendant?

A. No, sir.

Q. Did these hops, in every way, conform to this contract?

A. Yes, sir.

Q. Have they ever been received by John Roehm?

A. No, sir.

Q. Prior to the shipment of these hops had you received any communication from Mr. Roehm in relation to the contracts that had been entered into between you and him?

A. Yes, sir; a number of them.

Q. The first communication that was received by you from
73 him in relation to the particular four contracts in controversy here was dated when?

A. It was dated June 27th, 1896.

Q. Have you the letter now that you received at that time?

A. I have a copy of it.

Q. And the original is where?

A. In the hands of my attorneys in New York.

Q. The letter is headed how?

A. John Roehm, Bavarian and lager beer brewery, 856 Charlotte street, Philadelphia, June 27th, 1896. Messrs. Horst Brothers, 42 Pearl street, New York city.

Q. Prior to that time had you sent any notification to Mr. John Roehm?

A. Yes, sir.

Q. And what was that notification, please?

A. On June 23d, 1896, we notified him that the firm of Horst Brothers, consisting of Paul Horst, Louis Horst, and E. C. Horst, had been dissolved.

Q. What sort of notice was that?

A. A printed notice.

Q. Was that sent to all of your correspondents and those with whom you had dealings?

A. Yes, sir; that was sent to all of our correspondents.

Q. Did you reply to the communication of June 27th, 1896, received by you from John Roehm?

A. My brother, Paul, replied thereto in a letter dated New York, July 3d, 1896, in which he notified John Roehm that he had misconstrued the meaning of the notice of dissolution sent by us to the trade and that its meaning was simply that no new contracts

would be made, and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned the firm will discharge its obligations and will try to collect its claims, and that it does not ask for any releases or discharges and will punctually live up to all the contracts which it has made with you.

Q. Do you know whether or not yourself and your brother, Louis A. Horst, when in June, 1896, you continued in business under the firm name of Horst Brothers, received any assignment or transfer from Paul R. G. Horst, one of the former members of your firm?

A. Yes, sir.

Q. State whether or not the assignment related to the business formerly conducted by the old firm of Horst Brothers?

A. We received an assignment from Paul Horst of a number
74 of contracts, among which were these four contracts with John Roehm, and in addition we received a particular assignment from Paul R. G. Horst of these contracts with Roehm, dated July 1st, 1896. The later assignment was in the nature of a communication by Paul R. G. Host, of that date, to Mr. John Roehm, Philadelphia, Pennsylvania, notifying Roehm that the contracts with him had been assigned to Louis A. and E. Clemens Horst.

Q. Was that assignment from your brother, Paul R. G. Horst, to yourself and Louis A. Horst, sent to Mr. John Roehm?

A. That assignment was made in duplicate and one of these was sent direct by us to John Roehm, enclosed with our letter to him, dated October 23d, 1896.

Q. A copy of that letter, dated October 23d, 1896, is where?

A. A copy of that letter is with our attorney in New York. The original was sent by registered mail to John Roehm.

Q. Did you receive the receipt?

A. Yes, sir.

Q. Signed by John Roehm?

A. Yes, sir.

Q. Did you have other correspondence with John Roehm in relation to your contracts with him and the business of your firm with him?

A. We did. We wrote him under date of September 3d, 1896, from San Francisco. We received from him a letter dated September 14th, 1896. We wrote him September 4th, 1896. Wired him September 21st, 1896; wrote him confirming our wire September 21st, 1896, and again wrote him by registered letter October 9th, 1896, and on October 20th, 1896; we received a dispatch from him October 24th, 1896, declining to receive the shipment of hops that we sent to him pursuant to the contract, and we replied to his wire October 24th, 1896, saying we would await particulars of his letter. We received a letter from him dated October 24th, 1896, and replied October 29th, 1896. We likewise received a letter from Mr R. O. Moon, purporting to represent Mr. Roehm, dated October 24th, 1896, which letter was addressed to Paul R. G. Horst, 42 Pearl street, New York city. Subsequently we received a letter dated October 31st, from Mr. R. O. Moon, representing Mr. Roehm. These copies of our letters were retained and these copies have been for-

warded for use at the trial of this action. The original letters received from Roehm have been forwarded likewise for introduction in evidence at the trial of this action. The dates are here given merely for the purpose of identification. After the first repudiation by Roehm referred to hereinbefore, in a letter received from him by us, dated June 27th, 1896, we received a letter dated September 14th, 1896, in which Mr. Roehm says as follows: I take this
75 verbatim from accurate and compared copy of the letter received from Roehm of that date, the original of which will be introduced in evidence.

"Messrs. Horst Brothers, San Francisco, California.

DEAR SIR-: In response to your letter dated 3d and 4th insts. state before shipping me any hops always send me samples, from which I can select lots the same as you have been doing in the past.

JOHN ROEHM, JR."

Q. To what did the letter of September 14th, 1896, refer?

A. He referred to our letters of September 3d and September 4th, 1896, wherein we advised him that we would make the shipments of the hops called for by the four contracts in question and asking him whether we should ship the hops to him direct to Philadelphia or else to New York, as called for by the contracts.

Q. Did you write Roehm under date of September 27th, 1896?

A. Yes, sir.

Q. State what hops were referred to in that letter.

A. We offered him a very fancy lot of new crop Pacific Coast hops at seven and one-half cents per pound, delivered in Philadelphia.

Q. Was that letter in reference to the contracts that had been entered into between you and him?

A. No, sir; that was offering him other hops in addition to those already purchased by him.

Q. After the shipment of the twenty bales which you say Roehm refused to receive in October, 1896, did you see Mr. Roehm personally?

A. Yes, sir; I called at his office in Philadelphia and saw Mr. Roehm personally.

Q. Can you tell when you received the first positive declination from Roehm in which he refused to receive the hops shipped by you under the contract?

A. Yes, sir. The first positive declination I got from him was on October 24th, 1896, by telegraph—that is the declination of hops that we had shipped under the contract, though he had previously notified us that he would not receive the hops called for by the contract. That is on June 27th, 1896. Subsequently on September 14th, 1896, he wrote us before shipping any hops, meaning under the contracts in question, that we should send him samples from which he could select hops.

Q. State the contents of the dispatch received by you October 24th, 1896, referred to in your last answer.

76 A. The telegram was addressed "Horst Brothers, San Francisco," and read: "I decline to receive shipment of hops October 9th. Particulars by mail." The telegram was signed John Roehm.

Q. Now, after that date you say you had a conversation with Mr. Roehm in relation to the contracts. State when and where that occurred and what that conversation was.

A. The conversation we held in Mr. Roehm's office in Philadelphia. I asked Mr. Roehm to receive the hops called for by the contracts and he replied that he would not receive any hops under the four contracts in dispute. I told him we were ready and willing to comply with the contracts and ship the hops as provided therein, at the time specified in the contracts, but he refused to accept any hops under the contracts and — that he considered the contracts annulled. This conversation was in March, 1897.

Q. Did you have the hops called for by the contracts and were you ready to ship them in the amounts required during the months of November and December, 1896, and the months of January and February, 1897?

A. Yes, sir.

Q. And did you have and were you ready and willing to ship the hops called for by the contracts in the quantities therein named, to wit, twenty bales each month during the months of March, April, May, June, and July, 1897?

A. Yes, sir; in fact we have the hops yet and ready to deliver them even now.

Q. Were all of these hops that I have reference to that you were ready and willing to ship and that you had on hand and that you have now on hand prime Pacific Coast hops of the crop of 1896?

A. Yes, sir.

Q. Were the hops that you had shipped and those you had on hand ready to ship in conformity to the contracts carefully and skillfully picked, cured, baled and shipped and were they in good merchantable order?

A. Yes, sir.

Q. Are you ready and willing and able to ship in the month of October, 1897, and in the successive nine months thereafter twenty bales of prime Pacific Coast hops of the hop crop of 1897, in accordance with our contracts relating to the hop crop of 1897?

A. Yes, sir.

Q. Was there any other reason that you did not ship to Mr. Roehm, the defendant, the hops called for by the contracts of the crop of 1896, except his refusal to receive them?

A. There was no other reason.

Q. Will you state the weight of the hops to be delivered
77 by you in the future and that were ready to be delivered by you in the past under your contracts (to him).

A. About two hundred pounds per bale.

Q. Is that gross?

A. That would be gross weight.

Q. And you deduct then three and one-half pounds tare per bale?

A. Yes, sir.

Q. That would leave the net weight of the hops per bale what?

A. 196½ pounds per bale.

Q. Do you know what the market price of prime Pacific Coast hops was during the entire year of 1896 in New York city?

A. Yes, sir.

Q. State how you know.

A. We have our own house in New York city and we have our traveling men traveling around among the brewers in all the large brewing cities in the United States.

Q. Do you keep posted as to the market prices of hops throughout the United States at all times?

A. Yes, sir.

Q. Is that a part of your business?

A. Yes, sir.

Q. A necessary part?

A. Yes, sir.

Q. And during 1896 and for a long time prior thereto you had been engaged in buying and selling hops?

A. Yes, sir; all over the United States.

Q. State what the market price of prime Pacific Coast hops of the crop of 1896 was on October 24th, 1896, in New York city?

A. Seven and a half cents per pound.

Q. Prior to October 24th, 1896, was the market price higher or lower for prime Pacific Coast hops in New York city than seven and a half cents per pound?

A. The market price was lower: in fact so much lower that hops were not worth picking, and a large proportion of the crop remained unharvested.

Q. In October, 1896, did you enter into any contracts or purchase any Pacific Coast hops of the crop of 1896?

A. Yes, sir; on October 24th I bought one crop of prime Pacific Coast hops of 550 bales. The purchase was made at five cents per pound on the Pacific coast, which would be the equivalent of six and a half cents per pound in New York city; during that month we bought many thousands of bales at that same price.

78 Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From eight and a half to nine and a half cents per pound.

Q. Will you state what the custom of the hop trade is in relation to the purchase or sale of hops not yet grown?

A. Hops are bought and sold for future delivery, in fact, as much as ten years ahead.

Q. On October 24th, 1896, do you recall any sales or purchases made of prime Pacific Coast hops of 1897?

A. The market at that time was in such a condition that notwithstanding we had a number of men traveling around trying to sell hops of the crop of 1897, in the East and in New York city, and

elsewhere, we were unable to effect many sales, though we did make purchases on the Pacific coast, and so did many other dealers, at from seven to eight cents, on the Pacific coast, which is equivalent to eight and a half to nine and a half cents a pound delivered in New York city, the freight rate being one and a half cents per pound, and on that same date, October 24th, 1896, I bought one hundred (100) bales of prime 1897 crop Pacific Coast hops at eight cents per pound on the Pacific coast, which is equivalent to nine and a half cents per pound delivered in New York city.

Q. On October 24th, 1896, and during the month of October of that year, did you have on hand 200 bales of prime Pacific Coast hops of the crop of 1896?

A. Yes, sir.

Q. Did those hops in every particular conform to the contracts in relation to the hop crop of 1896, entered into between yourself and Mr. Roehm?

A. Yes, sir.

Q. Who was the individual, the person who made the contract in behalf of your firm, with the defendant, Mr. Roehm?

A. My brother and present partner, Mr. Louis A. Horst.

Q. Of your firm who was the one who did the selecting and purchasing of Pacific Coast hops?

A. I did all the selecting and purchasing of Pacific Coast hops for both the old firm and the present firm of Horst Brothers.

Q. For how long have you done all the selecting and purchasing of Pacific Coast hops for your firm?

A. Ever since our firm was organized, about nine or ten years ago.

79 Q. Have you had any contracts for Pacific Coast hops with Mr. Roehm for year prior to 1896?

A. Yes, sir.

Q. For how many years?

A. For three years prior, two hundred bales each year.

Q. Will you state whether or not those contracts — entered into at the same time the contracts in controversy in this case were entered into?

A. Yes, sir.

Q. Who had selected and purchased and shipped the hops under the contracts that were fulfilled with Mr. Roehm prior to 1896?

A. I had selected, purchased and shipped all the hops on the Pacific coast handled by our firm, and Mr. Roehm usually made his own selections from Pacific Coast hops shipped by me to New York city, out of which samples were sent to him.

Q. In 1896, were you engaged in growing hops as well as buying and selling them?

A. Yes, sir.

Q. And have you since been engaged in growing hops?

A. Yes, sir.

Q. Will you state to what extent you were engaged in growing hops?

A. To a much greater extent than the number of bales here in question.

Q. Will you state whether or not prime Pacific Coast hops are a staple trade article?

A. Yes, sir.

Q. State whether or not there are different grades of hops?

A. Yes, sir; there are different grades. The finest grade of Pacific Coast hops would be "fancy." The next lower grade would be "choice," and the next lower grade to choice would be "prime," then after that the next lower grade would be "medium," and the lowest grade would be "common." Those several grades are universally recognized among the trade.

Q. What was the condition of the market for prime Pacific Coast hops of the crop of 1896 in October, 1896, during the entire month?

A. The condition was that the brewers were heavily overloaded with hops just as this was the cause all over the world and selling was very difficult. It was almost impossible to find buyers. This was the case with the 1896 crop hops as well as the 1897 crop hops.

Q. What is the market price at New York city now for prime Pacific Coast hops for the crop of 1896?

A. The market price now is about four cents a pound.

E. C. HORST.

80 *Deposition of T. P. Lovdal.*

T. P. LOVDAL, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence and occupation?

A. My name is T. B. Lovdal. My age is 44 years. I reside in Sacramento, California. My occupation is that of a grower and dealer in hops.

Q. How long have you been a grower and dealer in hops?

A. For more than twenty years.

Q. To what extent are you a grower in hops?

A. Largely; I think I am the largest grower of hops in the world.

Q. Are you now and have you been familiar with the market price of hops?

A. Yes, sir.

Q. And for how long have you been familiar with the market price of hops?

A. It is a part of my business to be familiar with the market price of hops and I have been so for many years past.

Q. And during the year 1896, were you engaged in the growing, buying and selling of hops?

A. Yes, sir.

Q. To the same extent as you now are?

A. Yes, sir.

Q. State where you sell?

A. I sell to dealers and brewers in all parts of the United States and wherever I can find a customer.

Q. Do you know what the market price of prime Pacific Coast 1896 crop hops was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From seven to seven and a half cents per pound.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. Well, from eight and a half to nine and a half cents per pound.

Q. While you have been engaged in growing hops have you been engaged in growing, buying and selling prime Pacific Coast hops?

A. Yes, sir.

81 Q. And were you so engaged during the year 1896?

A. Yes, sir.

Q. Were you engaged in growing and selling for present crop sales and also for future years' crops?

A. Yes, sir; I have sold present crops and sold future crops for as many as five years in advance of the year of sale.

Q. State whether or not there are different grades of hops.

A. Yes, sir.

Q. What are they?

A. Hops are graded in the trade as follows: Commencing with the lowest, common, medium, prime, choice, and fancy.

Q. State whether or not prime Pacific Coast hops are a staple article of trade.

A. They are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops of the crop of 1896 higher or lower than seven and one-half cents a pound that you have mentioned?

A. It was much lower.

Q. What is the market price of prime Pacific Coast hops in New York city at the present time?

A. About four cents a pound.

T. B. LOVDAL.

Deposition of Charles Schmidt.

CHARLES SCHMIDT, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence, and occupation.

A. Charles Schmidt, 45 years of age, residence San Francisco, California, and hop dealer by occupation.

Q. How long have you been engaged in business as a hop dealer?

A. Over twenty-five years.

Q. State your business—what I mean is whether you buy and sell or whether you grow any hops.

A. I buy and sell.

Q. Where have you been engaged in business during the time that you have named?

A. In San Francisco, California.

Q. To what extent have you been engaged in that business?

A. We are pretty fair dealers. Sometimes five or ten thousand bales a year; depending on circumstances.

82 Q. Are you now and have you been familiar with the market price of hops during the time you have been engaged in business?

A. Yes, sir.

Q. State whether or not it is a part of your business to be familiar and to make yourself familiar with the market price of hops.

A. Yes, sir, it is.

Q. State whether or not your business is confined to San Francisco or whether you have sold hops in other places.

A. We sell hops throughout the United States.

Q. State whether or not you are familiar with the prices of hops in the United States.

A. Yes, sir.

Q. And during the year 1896, were you engaged in this business to the same extent that you now are?

A. Yes, sir.

Q. And selling as you have already stated all over the United States?

A. Yes, sir.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1896 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From seven to seven and a half cents a pound..

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From eight to ten cents a pound.

Q. During the time you have been engaged in the buying and selling of hops, have you been engaged in buying and selling prime Pacific Coast hops?

A. Yes, sir.

Q. And were you so engaged in the year 1896?

A. Yes, sir.

Q. Were engaged in buying and selling for present crops as well as for future years' crops?

A. Yes, sir.

Q. State whether or not there are different grades of hops.

A. There are.

Q. State what those grades are.

83 A. Common, prime, choice, and fancy.

Q. State whether or not prime Pacific Coast hops are a staple article of trade?

A. Yes, sir, they are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops of the crop of 1896 higher or lower than the price that you named was the market price on that date?

A. It was lower.

Q. What is the market value of prime Pacific Coast hops of the crop of 1896 in New York city at the present time?

A. Five to six cents a pound.

Q. State how long you have been carrying on business; whether in your own name or with a firm?

A. Well, for the last two years and over I have been a member of the firm. I was formerly a clerk.

Q. What is the name of the firm?

A. Herrmann & Company.

CHARLES SCHMIDT.

Deposition of Rudolph Wittenbrock.

RUDOLPH WITTENBROCK, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. Please state your name, age, residence, and occupation.

A. R. Wittenbrock. I was born in 1825 and am 72 years old, and live in Sacramento, California. My occupation is that of a hop raiser.

Q. How long have you been engaged in the hop business?

A. About thirty years. I started in 1866 and had hops in 1867.

Q. Do you do any more than grow them and sell them? Do you buy and sell also, or just simply grow and sell?

A. I grow them and I have bought some. Several years ago I bought some hops and shipped them to England, but not to make a business of buying. I grow and sell them.

Q. To what extent have you been growing hops? What I mean is how many bales a year?

A. I have grown from four hundred to six hundred and fifty bales a year. I grew very near seven hundred bales last year.

Q. That has been steadily during the past thirty years?

A. Yes, sir.

Q. Are you now and have you been since you have been engaged in business familiar with the market price of hops?

84 A. Well, as familiar, so far as we can find out what is offered and see what they get.

Q. You consider that you are familiar with the market price of hops?

A. Yes, sir.

Q. In the year 1896 you were growing hops and selling the hops that you grew?

A. Yes, sir

Q. Now, during the time that you have been growing hops and selling them, where have you sold them?

A. I have sold them in Sacramento; last year I sold them to Mr. Horst; the whole crop.

Q. Did you sell them anywhere else than in Sacramento?

A. No, sir.

Q. Didn't you ship some once to England?

A. I shipped some to New York. I didn't ship any in 1896. I sold the whole crop to Mr. Horst.

Q. You have sold hops outside of Sacramento?

A. Oh, yes; I have shipped hops.

Q. On October 24th, 1896, did you sell any hops to anybody?

A. Yes, sir.

Q. How many bales and who to?

A. About five hundred and fifty bales to Mr. Horst.

Q. To Mr. Horst, one of the plaintiffs in this action?

A. Yes, sir.

Q. What kind of hops were they?

A. Those were prime hops.

Q. Prime Pacific Coast hops?

A. Prime Pacific Coast hops of 1896.

Q. What did you receive for them?

A. Five cents a pound.

Q. You sold them where?

A. In Sacramento, California.

Q. Was that the market price for hops?

A. That was a good market price for taking the lot. There was a lot there. That was considered a good price or else I wouldn't have sold them. The market was pretty slack.

Q. What was the market price of prime Pacific Coast hops on October 24th, 1896, in New York city?

A. Well, I couldn't say. There would be about a cent and a half freight and that would make the price six and a half cents a
85 pound, probably. There is a cent and a half a pound freight now to New York city.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. No; I couldn't tell.

RUDOLPH WITTENBROCK.

Deposition of H. Uchtmann.

H. UCHTMANN, being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

Q. State your name.

A. Herman Uchtmann.

Q. Your residence?

A. Portland, Oregon.
Q. Your business?
A. Hop business.
Q. Your age?
A. Age 31.
Q. How long have you been engaged in the business as a hop dealer?
A. I have been engaged in the hop business about nine years.
Q. Under what name did you habitually do business?
A. H. Uchtmann.
Q. How many grades of hops are known to you in your business?
A. Choice, prime, medium, and common; occasionally fancy is brought in, but very rarely used as a grade.
Q. Do you know what the price, what the market price of Pacific Coast hops were in New York city on or about the 24th of October, 1896?
A. 7½ cents.
Q. For what grade or quality?
A. Well, from prime to what they call strictly prime; prime hops would bring that much.
Q. State, if you know, what the market value of that quality of goods was in New York city at the same day for the year 1897?
A. From nine to ten cents.
Q. Was the market price of that quality of goods higher or lower prior to October 24th, 1896?
A. Considerably lower.
Q. State what the price was about October 24th, 1896, for the crop of 1897 of the quality before mentioned.
86 A. From nine to ten cents.
Q. Were they a staple article of trade?
A. Yes, sir.
Q. Whereabouts do you market the goods which you handle?
A. Principally in New York city.
Q. Where do you buy?
A. Oregon and California.
Q. What grade of hops do you deal in?
A. All grades.
Q. Since you have been engaged in the business of a hop dealer at Portland, Oregon, I will ask you if your business has been a continuous one since you commenced it.
A. Yes.
Q. Do you buy and sell on what is known as futures?
A. Yes, sir.
Q. For what length of time do you make contracts of that character?
A. From one to four years.
Q. What is the market price of prime Pacific Coast hops of the crop of 1896 in New York city at the present time?
A. From four to five cents.

Q. Have you any personal interest in the result of this litigation?
A. None whatever.
[NOTARIAL SEAL.] (Signed) H. UCHTMANN.

Deposition of Kola Neis.

KOLA NEIS, being called as a witness on behalf of plaintiff-, after being first duly sworn, testified as follows:

By Mr. HOLMES:

Q. State your name.
A. Kola Neis.
Q. Place of residence?
A. Albany, Oregon.
Q. Age and occupation?
A. 34 years; hop dealear.
Q. How long have you been engaged in dealing in hops?
A. Seven years.
Q. At what place?
A. In the State of Washington, and Oregon.
Q. At what points did you market the hops which you dealt in?
A. We sold them all over the United States, and we sell in London.
87 Q. Since you have engaged in the business of dealing in hops have you followed it continuously to the present time?
A. Yes, sir.
Q. To what extent have you been engaged in the business—I mean about how many bales of hops do you buy a year?
A. From three to seven thousand bales; it depends upon the circumstances.
Q. Are you now, and have you been since engaged in your present business, familiar with the market price of hops?
A. Yes, sir.
Q. Is it a part of your business to post yourself respecting the market value of these goods?
A. Yes, sir.
Q. Do you know what the price of prime Pacific Coast hops of the crop of 1896 was—that is, what it was October 24th, 1896, in New York city?
A. Worth about seven and a half (7½) cents per pound.
Q. How are hops classified in the market where you were dealing?
A. In general?
Q. Yes, sir.
A. They are classified, strictly choice, choice, prime, and common.
Q. Is there a grade known to the market as fancy?
A. Yes, sir. That is what I class as strictly choice or fancy; they represent about the same thing.
Q. Do you know what the market price of prime Pacific Coast hops, of the crop of 1897, was on the 24th day of October, 1896?

A. From 9 to 9½ cents in New York.

Q. During the time you have been engaged in your present business have you had any experience in buying and selling what is known as prime Pacific Coast hops?

A. Yes, sir.

Q. Where were you so engaged in 1896?

A. Salem, Oregon.

Q. Were you engaged in buying and selling for the present crop, as well as for the future year crop?

A. Yes, sir.

Q. You may state, whether or not, if what is known as prime Pacific Coast hops are a staple article of trade?

A. Yes, they are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops higher or lower than the price named on that date?

88 A. They were much lower in price.

Q. What was the market price of prime Pacific Coast hops of the crop of 1896, in New York city, at the present time?

A. They are worth four or five or six cents.

Q. You may state under what name you have been carrying on your business?

A. In the name of Faber & Neis; that is the firm name.

(Signed) KOLA NEIS.

Diposition of T. A. Livesly.

T. A. LIVESLY, being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

By Mr. HOLMES:

Q. State your name, age, residence and occupation.

A. T. A. Livesly, Salem, Oregon; age 33 years.

Q. Your occupation?

A. I am a hop dealer and hop merchant.

Q. Are you also engaged in growing hops?

A. Yes, sir.

Q. How long have you been engaged in the business of hop merchant?

A. I have bought hops for the last nine years.

Q. At what place?

A. In Washington, Oregon and California.

Q. Are you familiar with the different grades of hops known to the trade in the localities you have just mentioned?

A. Yes.

Q. How many grades are known, and what are they?

A. There are about four grades.

Q. Name them.

A. Choice, medium, prime, common and trash.

Q. Is there a grade known as fancy?

A. Yes, there — a good many fancy hops every year.

Q. Are you familiar with the market price of prime Pacific Coast hops in New York city, on or about the 24th day of October, 1896?

A. Yes, I am.

Q. What would that quality known as prime, be worth at the date last mentioned?

A. In New York city?

A. Yes, sir.

89 A. About 7½ cents. I don't remember the exact date, but we sold some there; I think it was about that date, at that price.

Q. What would prime Pacific Coast hops, the crop of 1897, be worth on the 24th day of October, 1896?

A. We were not handling any hops at that time; and I did not pay much attention to the market, but they were worth about nine cents.

Q. Was the market price for this class of hops in New York higher or lower prior to October 24, 1896, than on that date?

A. It was lower.

Q. How much lower?

A. They started at 4½ cents, and gradually went up.

Q. Is the market price for that class of goods in New York, now higher or lower than it was on the date last mentioned?· October 24, 1896?

A. Well, I presume that the market would be about the same now, for that class of goods, possibly lower now; but I don't know what the market is; it certainly would be lower, and I doubt if it is higher.

Q. Is what is known as prime Pacific Coast hops a staple article of trade in the markets of the world?

A. Yes, they are.

Q. Is that true of the goods which are to be produced in the future as well as those already harvested?

A. I think so.

Q. Is there a market price at all times for such goods?

A. Yes.

Q. For such goods produced and to be produced?

A. Yes, always have been.

Q. Since you entered into the business you are now engaged in, as that of a hop merchant, has your occupation been a continuous one?

A. Yes, sir.

Q. Where were you operating mainly?

A. In Washington and Oregon.

(Signed) T. A. LIVESLY.

90 WILLIAM UHLMAN, having been duly sworn on behalf of the defendants, was examined as follows:

By Mr. DICKSON:

Q. Where do you reside?

A. In New York city.

Q. What is your business?
A. The hop business.
Q. How long have you been engaged in that business and where?
A. Twenty-two years, in New York city, and in San Francisco.
Q. How long in San Francisco?
A. Three years in San Francisco, from 1882 to 1885.
Q. Do you buy and sell?
A. Yes, sir.
Q. Where is your firm?
A. My firm in New York is S. & F. Uhlman, and in San Francisco, the style of the firm is William Uhlman & Co., but it is virtually one firm.
Q. How does the amount of your annual sales compare with those of other dealers in New York?
A. I claim to be one of the largest hop dealers in the United States.
Q. What are the different grades of hops?
A. Choice, prime, medium and low grades.
Q. What is the ordinary difference in price between those grades?
A. When prices are ranging say at about ten cents for choice, I should say that prime hops were worth from eight and a half to nine, and medium hops about seven and so on.
Q. There would be from one to two cents between choice and prime?
A. Yes, sir. If prices are higher the difference would not perhaps advance in the same proportion but there might be three cents a pound difference between the different grades providing the prices were very high.
Q. In other words, the difference in prices between grades increases as the market price increases?
A. Yes, sir.
Q. In grading hops is there a gradual decline from the highest quality, that is, the best quality of choice, going down by slight and almost imperceptible gradations?
A. Yes, sir.
Q. Would it be possible then to have a controversy as to
91 whether a particular lot of hops should be classed as choice or prime, or prime or medium?
A. Yes, sir; there would be some difference. There is even a doubt whether a hop is really choice or prime, and it is the same between prime and medium.
Q. Does it require experince, skill and judgment to discriminate?
A. Centainly, considerable.
Q. Would an ordinary customer be able, from looking at a sample of hops, to say whether it was as one or the other?
A. Most of them would not be able to do so.
Q. Would skill, judgment or experience be required on the part of a buyer on the Pacific coast?
A. Yes, sir.
Q. Are there, in point of fact, variations in the quality of the hops which would properly be described as prime, that is to say

would there be prime which would be described as strictly prime and then prime which would be considerably off and approach pretty nearly to medium?

A. Yes, sir. There is certainly a difference of opinion even amongst experts whether a hop is prime, or between prime and choice, or between prime and medium.

Q. Is the hop crop exposed to the same uncertainties as other agricultural products?

A. More so than most of them.

Q. Explain why.

A. First on account of the climatic conditions or the weather. Often hops are looking nice on the poles and during harvest time heavy storms come up, or considerable rain. If so, a crop may become damaged while being picked and may lose color and sometimes flavor. After the harvest it is subjected to a drying process or a curing process, and the hop which might have looked very nice on the pole, might still get spoiled in curing. It is sometimes slack-dried or not sufficiently dried, while at other times it may be high-dried, or overdried and get scorched and spoiled.

Q. If the hops are improperly dried will they keep?

A. Slack hops are often liable to heat, and to become spoiled.

Q. Is it always possible for an expert to properly grade hops without having samples for his own guidance?

A. It is difficult. It is sometimes puzzling for an expert.

(Question repeated.)

A. It is difficult.

Q. That is not an answer to the question. Is it always possible to do so?

92 A. It is not always possible to do so.

Q. Were you acquainted with the prices of hops of the crop of 1896 in the month of October, 1896? I mean of all classes.

A. Yes, sir.

Q. What was the price of prime Pacific Coast hops of the crop of 1896 in the city of New York upon the 24th of October, 1896?

A. About nine and one-half cents—nine and nine and one-half cents.

Q. Can you give the prices for the month of November, December, January and February following?

A. Yes, sir; the price for prime hops in November were twelve to thirteen cents. In December, 11 to 12 cents. In January and February the same prices.

Q. Do you know of actual sales made at those figures?

A. Yes, sir. We made sales to a considerable extent at those prices.

Q. Can you give the prices of prime Pacific Coast hops of the crop of 1896, in the month of March, April, May, June and July, 1897?

A. Yes, sir. March, 10 to 11 cents. April, 8½ to 9½ cents. May, 8 to 9 cents. June, the same. July, the same.

Q. Is there any trade journal which is recognized as authority in the trade, which gives the price of hops?

A. Yes, sir. It is the Journal of Commerce and Commercial Bulletin of the city of New York, which is published daily except Sundays.

Q. Is that a recognized authority in the trade?

A. Yes.

Q. Are you in the habit of reading it daily?

A. I read it pretty nearly every day.

Q. From your own knowledge are you able to say whether those reports are accurate?

A. I consider them accurate, yes.

Q. What is included under the designation of Pacific Coast hops?

A. The States of California, Oregon and Washington.

Q. Then the hops of any one of those States come under the term Pacific Coast hops?

A. Yes, sir.

Q. In the month of October, 1896, was there a market price for the hops of 1897, deliverable in 1898?

A. No, sir; except speculatively.

Q. Were they quoted or sold on the market in any way?

93 A. No, sir; they are never quoted in advance. Futures are not quoted.

Q. Would any price of the kind be actual or fictitious?

A. It would be fictitious.

Q. What was the price of Pacific Coast hops of 1896, in September, 1897?

A. Prime hops were then quoted 7 to 8 cents per pound in New York city; in September, 1897, for the 1896 crop.

Q. Do you mean actual sales?

A. There were actual sales at those figures, yes.

Q. Do you know what the condition of the hop market was in San Francisco or on the Pacific coast during the summer of 1896 for the growing crop of 1896?

A. It was a dull and depressed market. Some dealers advised the growers not to pick their hops, and some growers felt discouraged and could not raise the money to pick their hops, and some of the hops remained unpicked on that account during the season; that is, in the months of July and August, 1896.

Q. Was there any change in market conditions subsequent to that time?

A. There was considerable change, and the principal change occurred in October and November of the same year. The market became very active; an export demand sprung up and prices advanced considerably in October and much more so in November.

By Mr. MOON:

Q. You say you are extensively acquainted on the Pacific coast with hop-growers and hop dealers?

A. Yes, sir.

Q. Do you know Mr. Lovedale, a dealer in hops on the Pacific coast?

A. I know three Lovedales from Sacramento.

Q. Do you know Mr. T. B. Lovedale?

A. Yes, that is Thomas B. Lovedale. I know him personally.

Q. Is he engaged there as a hop-grower or hop dealer?

A. He is principally a hop-grower. At the time I was on the coast he was only a grower. He has since dealt some in hops, and I know that he had some joint-account transactions with the plaintiffs.

Q. Did you know that he was connected in business with Horst Brothers?

A. I do not know within the last year or two, but I know that he has been connected with them in different hop deals in the last six or seven years.

94 Q. Do you know R. Wittenbrock?

A. Yes, sir; that is Mr. Rudolph Wittenbrock. He is a large hop-grower in Sacramento.

Q. Is he engaged in the hop business in any other way except as a hop-grower?

A. No, sir.

Q. Do you know whether or not he had any connection in any way with the firm of Horst Brothers?

A. I do not think he had, except that he sold them hops, perhaps. I do not know whether he did or not.

Q. From your knowledge of Mr. Wittenbrock you know that he is engaged in business only as a hop-grower?

A. Yes, sir. A hop-grower sometimes sells some of his own product to dealers and brewers, but he is not considered a dealer. He is a hop-grower. He might sell some of his own crops direct to brewers.

Q. Do you know T. A. Livesly?

A. Yes, sir.

Q. In what bu-iness is he engaged?

A. He is a hop dealer from the State of Washington. There is one Livesly—I do not know his first name—he is a hop dealer in New York city—formerly of Washington. There are a father and two sons, but I do not know which one T. A. is, I know the old gentleman, and also one of the young men.

Q. Do you know T. A. Livesly?

A. I do not know the initials. I know two of them, but I do not know positively whether he is the one or not.

Q. (Papers shown witness.) These are copies of the New York Journal of Commerce which you have brought over to Philadelphia?

A. Yes, sir. I may say that the figures that I have mentioned I figured from the Journal of Commerce and by my own books, by personal examination of actual sales and by personal examination of the Journal of Commerce of the different dates. I mean actual sales made by me.

Cross examination.

By Mr. PRICHARD:

Q. Do you mean to say that a brewer, who for years has been buying hops for his own trade in large quantities, is not able to determine the difference between the different grades of hops?

A. I say that many brewers are not able to do so.

Q. You do not mean to say that Mr. John Roehm is not able to do so, do you?

95 A. I have never met Mr. John Roehm. I do not know about the man, because I have never met him except about one or two weeks ago. He might be able, and he might not be able.

By Mr. MOON:

Q. You never had any business connection with him of any kind?

A. No, sir.

By Mr. PRICHARD:

Q. It is true, is it not, of almost every kind of merchandise sold on the market, that it requires some expert knowledge for a man to safely buy?

A. Yes, sir.

Q. In the last ten years the range of the prices of hops have run as high as forty and as low as five and six cents, has it not?

A. Yes, sir.

Q. What is it now for prime Pacific Coast hops of the 1897 crop?

A. 14 to 15 cents.

Q. How long has it been in the last year, 1897 crops?

A. Before there was only a speculative price. There was no price established for the 1897 crop until about a month ago.

Q. How long was the 1896 crop during 1896—what was the lowest for prime quality?

A. I think 7 to 8 cents was the lowest.

Q. I have observed that in giving the market price on October 24th, 1896, of prime Pacific Coast hops of the crop of 1896, which you say is in accord with the Journal of Commerce quotations, you have given the very highest figure of the range so cited in the Journal of Commerce. Why do you do that?

A. I beg to refer to the Journal of Commerce of that date. I believe that they are quoted medium and prime, and the lowest is for medium and the highest quotation for prime. If I go by my books I have sold at higher prices such grades than the quotations of the Journal of Commerce.

Q. Do you mean to say that the Journal of Commerce quotation, which you have given, is understood in the trade to mean that all prime hops sell for the highest price of that range?

A. No, sir. I believe it stated 9 to 9½ cents in my answer. The highest quotation there is 9 to 9½, and I believe the next is 10.

Q. What was the range of quotations in the Journal of Commerce?

A. On the 24th it was 7 to 9½ for medium and prime.

Q. You have given 9½ cents as the market price of prime?

A. I said 9 to 9½.

96 Q. And you think that indicates the entire range of prices, from 9 to 9½ for prime Pacific Coast hops?

A. Yes, sir; because I believe at that time, which I see by referring to the Journal of Commerce of the 28th and 29th, the quotations are medium to prime; say 8 to 10 cents. I know also by sales from our own books that we have made sales of prime hops at 9½ and 10 cents about that time.

Q. Did you make no sales for lower than that?

A. No, sir. I wish to say that in the two weeks or ten days from October 23d to the 30th we did a very extensive business in Pacific Coast hops, selling near two thousand bales, and the prices ranged for the different grades from 10 to 14½ cents, and only one sale did we make of ten bales at 9½ cents, all within ten days.

Q. When was your sale at 9½?

A. October 28th. That was medium quality. Not even prime.

Q. What is your next sale before that?

A. On the same day we made several other sales of different grades, one in St. Louis at 14 cents. We sold to two parties in St. Louis on the same date at 14 cents, choice Pacifics.

Q. Delivered where?

A. In St. Louis.

Q. What is your next sale of prime prior to that?

A. October 21st or 22d. Call it the 21st, because I can discern that date better.

Q. Were those primes?

A. Yes, sir. I sold them on the market to a dealer.

Q. What was the price you obtained in that case?

A. 10 cents.

Q. Who was the dealer, and where were they deliverable?

A. The dealer was F. W. Simmons & Son. They were deliverable in New York city. I sold him two hundred and fifty bales of choice hops at 11 cents on that date.

Q. How many bales were the prime?

A. I sold him 55 bales at 10 of prime, and 249 choice at 11.

Q. What is your sale next immediately before that of prime?

A. I did not go back any further than I have stated.

Q. Do I understand you to mean by your answer to Mr. Dickson that it was not a common thing to sell hops of the crop of 1897 at the end of 1896?

A. It was not a common thing, except that some dealers sold futures speculatively. I say the price was not established for the 1897 crop in 1896.

97 Q. Is it not true that brewers very frequently make five-year and sometimes even ten-year contracts for their supply of hops in advance?

A. I never heard of a ten-year contract. I have heard of a five-year contract.

Q. Is not that an ordinary thing in the trade?

A. Not an ordinary thing. It has been done. It was done about four or five years ago to a larger extent than it has been since.

Q. Do you mean to say that you would be unable to quote a price to a brewer who came to you in October, 1896, for hops of the crop of 1897?

A. No, sir; if I felt like selling futures, which I sometimes would and sometimes would not, I would calculate a probable fixed price for him. At the same time, this price may be two or three cents per pound higher than other dealers, and it may be two or three cents per pound lower. It is simply a matter of opinion what I would be willing to sell for.

Q. But that price would be based upon what you could purchase from the producer of the hops a similar amount of hops deliverable in 1897, would it not?

A. That would have considerable weight, of course.

Q. Do you know from observation or from actual sales what prices were obtained in October, 1896, for hops of the crop of 1897?

A. I do, because we made a sale of the 1897 crop about that time, but for choice hops, not prime.

Q. What price did you get for them, and what was the date of the sale?

A. I do not think I put them down, but I know I made that sale. It was 15 cents per pound. My associate made a sale in Baltimore at the same time. I know the price was 15 cents, but I do not know the date.

Q. Those were choice Pacific Coast hops of the crop of 1897, were they?

A. Yes, sir.

Q. Will you verify that price by your book when you return, and if it is incorrect let us know the fact.

A. Yes, sir; as far as the price is concerned I am sure it is right.

Q. How many bales were there?

A. Three hundred.

Q. Deliverable where?

A. In Baltimore.

98 Q. Is there any difference in freight between Baltimore and New York?

A. If shipped direct from the coast the freight is the same.

Q. Ordinarily what is the difference between the market price in New York and the market price in San Francisco? It is the difference in freight, is it not?

A. It is generally the difference in freight, and probably a buying commission of half a cent a pound.

Q. Were hops slow or active in June, 1896?

A. They were very slow.

Q. How about September, 1896?

A. They were slow also, but somewhat livelier than in June.

Q. How about October?

A. They were active.

Q. More active than in September?

A. Considerably more; yes, sir.

Q. How about the hop market in '93—was it uncertain, or pretty well settled?

A. I cannot recall that. I have not looked it up, and it would be very difficult for me to say how the market was every month four years ago.

Q. When you say that these gentlemen who have testified in the cause are hop-growers, and not hop dealers, you do not mean to say that they do not sell their hops, or that they do not have large experience as to market prices, do you?

A. They have not got as much experience as to the market price as dealers have.

Q. Is it not of vital importance for them to watch the market in order to know what prices they are going to get for their crops?

A. Yes, sir; but at the same time they are not as well posted as a general rule as dealers are, not coming in contact with the brewers, nor having any connections in Europe to get cable news, and therefore they are not as well posted as dealers are supposed to be.

Q. Do not some of those hop-growers themselves sell direct to brewers?

A. They do frequently.

Q. You have picked out certain of these journals of commerce, as I understand, in the various months about which you have been asked. How have you taken those numbers? Have you taken the ones that showed the highest prices in the month?

A. No, sir; I have taken them as near to the 24th of every month as possible. When that fell on Sunday I took either the 23d or the 25th.

99 Q. What is the usual range in the market price of prime hops on any day—that is, about how much will the highest and the lowest prices obtainable for prime Pacific Coast hops vary?

A. On the basis of a 10 and 12 cent market for choice I should say the difference in the different ranges between prime is about 1 cent per pound.

Q. Please dismiss from your mind entirely all considerations about choice hops. I am asking you now what is the usual variation between the highest and the lowest price prime Pacific Coast hops on any day.

A. It varies with the valuation of the hops.

Q. What is the range of valuation—about how many cents will that valuation range through in one day?

A. On the basis of 10 and 12 cent prices it would vary one cent per pound.

Q. How about 8 and 9 cent prices?

A. About the same.

Mr. DICKSON: The witness means to say that the prime hops on the same day might sell as low as 8½ or as high as 9½.

The WITNESS: Yes, that is right.

By Mr. PRICHARD:

Q. Do you mean to say that the ordinary variations between the highest and the lowest prices of prime Pacific Coast hops is only one cent a pound on the same day?

A. Yes, sir. Sometimes not as much.

Q. And sometimes a good deal more?

A. Very seldom. Otherwise they would come into the category of medium or choice.

Mr. MOON: The witness does not understand you.

The WITNESS: Yes, I do.

By Mr. PRICHARD:

Q. So that among the dealers in hops in New York or San Francisco who are making contracts for hops deliverable in New York the ordinary difference between the highest and the lowest prices those dealers would obtain would be for prime Pacific Coast hops, one cent a pound?

A. Yes, excepting that if prices would be 20 cents a pound, or 25, then it might vary more.

Q. But on the basis of 8 and 10 cents a pound the variation would be only one cent a pound?

A. Yes, sir.

100 Redirect examination.

By Mr. DICKSON:

Q. If you found a variation of more than one cent a pound on the same day between different dealers, would that indicate to your mind a difference in the market price or a difference between what the two called prime hops?

A. It would either indicate to me a difference of opinion as to quality, or if there was that difference that one of the two parties was not well posted.

Q. In giving the prices which you have given of actual sales made by you, were they special sales, or did they in your judgment fairly represent the market?

A. They fairly represented the market.

Q. Then upon those figures hops could have been bought or sold on those days?

A. Yes, sir.

Adjourned.

But the plaintiff did object to certain of the foregoing testimony of John Roehm, which was in the words following, to wit:

Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

Q. What was your method of doing business—did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making those contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

101 A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers, through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you and to your trade?

A. Some of them were.

Q. Had you ever had any difficulty at all respecting the quality of the hops, with Horst Brothers, prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q Had Paul Horst always made those matters right?
A He always made them right.

And the learned judge did exclude the same from consideration and the defendant now excepts to the said exclusion and this exception is duly noted and sealed.

And afterwards, to wit, upon the 27th day of January, 1898, the learned judge did file his findings of fact and his opinions thereon (*pro et* the same).

102 Thereupon the counsel for the said defendant except to the said opinions and the rulings therein contained as follows, to wit:

First. Because the learned judge held that the defendant's contracts with Horst Brothers were not annulled by the dissolution of that firm, nor by the assignment of one of the partner's interest therein to his copartners.

Second. Because the learned judge held that there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the member who assigned to his copartners.

Third. Because the learned judge held that a right of action had accrued to the plaintiffs with respect to all the contracts in question at the time this suit was brought.

Fourth. Because the learned judge held that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable.

And the counsel for the defendant further excepts to the entry of judgment in favor of the plaintiff, and against the defendant in the sum of ten thousand one hundred and eighteen dollars and thirty cents ($10,118.30).

Counsel for John Roehm, the said defendant, do now tender this bill of exceptions to the aforesaid exclusion of testimony, to the findings of law and to the entry of judgment by the said court, and do request the seal of the judge aforesaid be put to the same according to the form of the statute in such case made and provided; and thereupon the judge aforesaid, at the request of the said counsel for the said defendant, doth put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 28th day of February, 1898.

GEO. M. DALLAS, [SEAL.]
Circuit Judge.

I have no objection to the sealing of this bill.
FRANK P. PRICHARD,
For Plaintiff.

February 26th, 1898.

Endorsed: In the circuit court of the United States, October session, 1896. No. 42. Horst Brothers, etc., *vs.* John Roehm. Bill of exceptions. Filed February 28th, 1898. Samuel Bell, clerk. R. O. Moon, Samuel Dickson.

103 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The petition of John Roehm respectfully represents:

That on the 13th and 14th days of December, 1897, the above-entitled cause came on for trial before the Honorable George M. Dallas, judge of the court, without a jury, and thereafter, to wit: on the 27th day of December, 1897, the learned judge did file of record his findings of fact and law, and did enter judgment in favor of the plaintiffs and against the defendant, your petitioner, in the sum of $10,118.30; and that your petitioner is aggrieved by the said findings of the learned judge and he files herewith a specification of errors.

Wherefore your petitioner prays that your honorable court allow a writ of error in the cause to be taken to the United States circuit court of appeals for the third circuit.

And he will ever pray.

JOHN ROEHM.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

John Roehm, being duly sworn according to law, doth depose and say, I am the defendant in this cause, the statements contained in the foregoing petition are true and this writ of error is not taken for purposes of delay, but because I believe injustice has been done.

JOHN ROEHM.

Sworn and subscribed before me this fourth day of March, 1898.

W. C. HARRIS,
Notary Public.

[SEAL.]

104 Endorsed: 42. Oct. sess., 1896, U. S. circuit court. Horst Brothers, to the use, etc., of California, *vs.* John Roehm. Petition for allowance of writ of error to the U. S. circuit court of

appeals Filed Mar. 17, 1898. Samuel Bell, clerk. Allowed. Geo. M. Dallas, cir. J. R. O. Moon, Samuel Dickson.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

Assignments of Error.

The appellant assigns for error the following:

First. That the learned judge erred in holding that the defendant's contracts with Horst Brothers were not annulled by the dissolution of that firm, nor by the assignment by one of the partners of his interest therein to his copartners.

Second. That the learned judge erred in holding that there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the member who assigned to his copartners.

Third. That the learned judge erred in holding that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought.

Fourth. That the learned judge erred in holding that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable.

Fifth. That the learned judge erred in excluding the testimony of John Roehm in the words following, to wit:

105 Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

Q. What was your method of doing business; did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making these contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops, or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you, and to your trade?

106 A. Some of them were.

Q. Had you ever had any difficulties at all respecting the quality of the hops, with Horst Brothers, prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q. Had Paul Horst always made those matters right?

A. He always made them right.

Sixth. That the learned court below erred in entering judgment in favor of the plaintiff and against the defendant in the sum of

ten thousand one hundred and eighteen dollars and thirty cents ($10,118.30).

R. O. MOON,
SAMUEL DICKSON,
For Plaintiff in Error.

Endorsed: 42. Oct. sess., 1896, U. S. circuit court. Horst Brothers, to use of, etc., of California, *vs.* John Roehm, of Pennsylvania. Assignments of error. Filed Mar. 17, 1898. Samuel Bell, clerk, per R. R. O. Moon, Samuel C. Dickson.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

Know all men by these presents, that I, John Roehm, as principal, and the American Bonding and Trust Co., of Baltimore city,
107 as surety, are held and firmly bound unto Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, to the use of E. Clemens Horst and Louis A. Horst, in the sum of $22,000, to the payment of which sum the said obligors do bind themselves, their heirs, executors, and administrators firmly by these presents.

The condition of this obligation is, that whereas the said Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, to the use of E. Clemens Horst and Louis A. Horst, have obtained a judgment in the circuit court of the United States for the eastern district of Pennsylvania against John Roehm, in the sum of $10,118.30, as of October sessions, 1896, No. 42; and

Whereas the said John Roehm has presented his petition praying for the allowance of a writ of error, and has filed therewith assignment of error, and said petition has been allowed:

Now, if the said John Roehm shall prosecute said writ of error with effect, and the said judgment be reversed, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

Witness the signature and seal of the party hereto this nineteenth day of March, 1898.

JOHN ROEHM. [SEAL.]
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By its attorney, FRANCIS B. BRACKEN. [SEAL.]

Witness as to surety:
J. EDWARD RYAN.

I have no objection to the approval of the above bond.

FRANK P. PRICHARD,
Attorney for Plaintiff.

Approved:

GEO. M. DALLAS, *Cir. Judge.*

Endorsed: 42. October sessions, 1896, U. S. C. C. Horst Brothers, to the use of, etc., of California, *vs.* John Roehm, of Pennsylvania. Bond on writ of error. Filed March 22, 1898. Samuel Bell, clerk. R. O. Moon, Samuel C. Dickson.

108 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of E. Clemens Horst *et al. vs.* John Roehm, No. 42, October sessions, 1896, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirtieth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

SAMUEL BELL,
Clerk of C. C.

Endorsed: No. 42. Oct. sessions, 1896, circuit court United States, eastern district of Pennsylvania. E. Clemens Horst *et al. vs.* John Roehm. Certified copy of record.

Endorsed on cover: Case No. 17262. U. S. C. C. of appeals, 3d circuit. Term No., 188. John Roehm, petitioner, *vs.* Paul R. G. Horst *et al.* Filed January 16, 1899.

109 In the United States Circuit Court of Appeals for the Third Circuit.

And afterwards, to wit, on the tenth day of October, A. D. 1898, this cause being called for argument on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, circuit judge, and Hon. William Butler and Hon. Andrew Kirkpatrick, district judges, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the sixteenth day of December, A. D. 1898, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion, to wit:

110 In the United States Circuit Court of Appeals for the Third Circuit.

JOHN ROEHM, Plaintiff in Error,
vs.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading under the Firm Name of Horst Bros., to the Use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Butler, and Kirkpatrick, J. J.

KIRKPATRICK, *District Judge:*

In August, 1893, Paul R. G. Horst, E. Clement Horst, and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date; are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under
111 the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract cancelled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm as follows:

"DEAR SIR: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"Very truly, HORST BROTHERS."

To this letter Roehm replied, under date of September 14, 1896:

"DEAR SIRS: In response to your letters dated 3d & 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"Very truly, JOHN ROEHM."

On October 9, 1896, Horst Brothers advised Roehm of twenty bales of hops per October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"GENTLEMEN: Yours of October 9, enclosing bill of lading and bill of particulars per twenty bales of hops forwarded me under the terms of contract of August 23, 1895, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods
112 at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"Very truly yours, JOHN ROEHM."

No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this suit was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs.

It was asserted by the defendant upon the trial below that his contract with Horst Brothers was annulled by the dissolution of that firm and the assignment by one partner to his copartners of his interest therein. To this proposition we cannot assent. The contract was entered into by Roehm with the plaintiffs jointly, not with either of them separately. The dissolution of the firm in no way affected the obligations of any of the parties. The retiring member, Paul R. G. Horst, was, notwithstanding his withdrawal, answerable to Roehm for the faithful performance of the contract, and in like manner Roehm was still bound to the remaining members of the firm. The same principle which would have permitted Roehm to compel the performance of the contract on the part of the plaintiffs, either in their partnership or individual capacities, enables them in the same way and to the same extent to require him to observe the obligations entered into on his part. As was said in the case of Campbellsville Lumber Co. *v.* Bradley, 96 Kentucky, 494, where a corporation — had a contract to sell certain lumber to a firm for cash refused to deliver after the retirement of

one member of the firm, "It seems the transfer was made upon the dissolution of the firm of Bradley & Wiggins, the benefit of that contract falling to the latter in the division of the assets: but as Bradley did not and could not, in virtue of either the dissolu-
113 tion or transfer to Wiggins, release himself from the undertaking by the firm to pay the defendant for lumber upon delivery, we do not see how the latter was effected nor upon what principle it could be released from its undertaking. If it was, then the dissolution of a partnership would in all cases put an end to each mutual and reciprocal contract the firm may have entered into, however profitable or advantageous. But it does no more take away the rights of individual members than it releases him from obligation to perform." To the same effect are Fish *v.* Gates, 133 Mass., 441; Holmes *v.* Shands, 27 Miss., 40. The cases upon which the defendant below relies will be found upon examination to relate to a different state of facts from those which the record in this case discloses. In some of them the legal plaintiff, as in Boulton *v.* Jones, 2 H. & N., 564, and Boston Ice Co. *v.* Pottie, 123 Mass., 30, or the legal defendant, as in Humber *v.* Hunter, 12 Q. B., 64, was a stranger to the contract, and the court very properly said it to be the law "if a person intends to contract with A, B cannot give himself any rights under it," and that "B could not be bound by a contract to which he was a stranger." Clearly these rules have no application here, where all the parties to the suit are the same who made the contract.

The other cases referred to in this connection by the defendant's counsel relate to a class where reliance has been placed upon the judgment or ability of one of the parties to the contract to perform a particular work. This reliance must be apparent upon the face of the contract or from the nature of the employment. The contract set out in this record is one of ordinary character for the mere sale and delivery of goods. Not only does it fail to show that any re-
liance was placed by the vendee upon the skill or judgment
114 of any of the vendors, but it in express terms provides for the contingency of disputes arising with respect to the quality or condition of the hops which were the subject-matter of the contract. If proof were needed that the defendant did not intend to be guided in his determination of the quality of the hops furnished by the opinion of any of the contracting parties it might easily be gathered from his testimony in the cause and his letter of September 14, 1896, in which he says, "Send me samples from which I can select lots, the same as you have been doing in the past." The memoranda of agreement entered into between the parties and signed August 23, 1893, were regarded by the parties as but evidences of a single contract. They were so construed by the court below, and, we think, properly. This contract had been partially performed, and the refusal of the vendee to receive deliveries of goods under it was most clear and unequivocal and indicative of his intention to repudiate it. There can be no mistaking the meaning of the terms employed by him in so doing. "I am advised," he says, "that I am under no obligation by that contract to accept supplies from you." "If you

desire to bill these goods * * * under a new contract I will accept them, * * * otherwise they will remain at the freight station subject to your order." This was a sufficient evidence of defendant's renunciation of the contract, in which the plaintiffs acquiesced by the bringing of this suit. The refusal to accept was not limited to the particular shipment of October, 1896. It was general as to the whole contract and founded upon the assertion that the contract of August 25, 1896, by the dissolution of the firm of Horst Brothers was ended, and that the defendant was not bound by it, but was free to get his supplies elsewhere.

Under these circumstances the plaintiffs were justified
115 in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States, in Dingley *v.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *v.* De la Tour, 2 Ell. & Bl., 678, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *v.* Van Eeghen, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the circuit court of appeals for the second circuit, says: "In view of the overwhelming preponderance of adjudication we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once." That the right to begin an action carries with it the right to obtain judgment needs no argument. The only question is, What shall be the measure of damages in cases of this nature? In an action upon an ordinary contract for sale and present delivery the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that this is not a general invariable rule is apparent from the fact that it cannot be made to serve as a measure in cases like the one at bar, where there is need for an immediate ascertainment, though the delivery by the terms of the contract was not to be made until after the rendition of the judgment. The rule was no doubt
116 adopted because in cases where applicable it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case other means must be employed, the courts do not hesitate to adopt a different rule. Thus in Huntley *v.* Pittsburgh Bessemer Steel Co., 121 U. S., 264, where a contract was made for steel rails of a particular kind, which the plaintiff *were* prevented from manufacturing and delivering by the misconduct of the defendant, the court held that the "proper rule of damages was the difference between the cost per ton of making and delivering and the contract price."

The basis of the recovery was said to be the gain which the plaintiffs would have had if permitted to complete the contract.

The damages of the plaintiffs in this case should be assessed upon the same principle, that of the gain there was to *him* in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops deliverable according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The obligation on the part of the plaintiff that he is entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made it necessary an antecedent ascertainment of the damages and is bound to accept the situation caused by his own wrong-doing. Anvil Mining Co. *v.* Humble, 153 U. S., 540. The record shows at what price such subcontracts as are above referred to were obtainable and judgment was rendered in accordance therewith.

It must be affirmed.

117 United States Circuit Court of Appeals, Third Circuit, September Term, 1898.

JOHN ROEHM, Plaintiff in Error,
v.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading as Horst Bros., to the use of E. Clemens Horst and Louis A. Horst. } No. 33.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

Philadelphia, January 3, 1899.

WM. BUTLER, *J.*

118 UNITED STATES OF AMERICA, *set*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages, from one to one hundred and eighteen, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of John Roehm, a citizen of the State of Pennsylvania, as plaintiff in error, *vs.* Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm name of Horst Bros., to the use of E. Clemens Horst and Louis A. Horst, as defendants in error, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which John Roehm is plaintiff in error and Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm of Horst Bros., to the use of E. Clemens Horst and Louis A. Horst, defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the eastern district of Pennsylvania, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
120 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

121 [Endorsed:] Supreme Court of the United States. No. 677. October term, 1898. John Roehm *vs.* Paul R. G. Horst *et al.* Writ of certiorari.

122 In the United States Circuit Court of Appeals for the Third Circuit.

JOHN ROEHM, Plaintiff in Error,
vs.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

It is hereby stipulated that the certified copy of the transcript of record filed in the office of the clerk of the Supreme Court of the United States, at Washington, together with the petition for a writ

of certiorari, may be taken as a return to said writ, and that no additional copy of the record need be filed.

Philadelphia, January —, 1899.

SAM'L DICKSON,
For John Roehm, Pl'ff in Error.
FRANK P. PRICHARD,
For Paul R. G. Horst et al., to Use, &c., Def'ts in Error.

123 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto annexed as my return to the said writ.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this first day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

124 [Endorsed:] File No., 17,262. Supreme Court U. S., October term, 1899. Term No., 188. John Roehm, petitioner, *vs.* Paul R. G. Horst *et al.* Writ of certiorari and return. Filed Feb. 2, 1899.

Office Supreme Court U. S.
FILED
JAN 16 1899
JAMES H. McKENNEY
Clerk

No. . October Term, 1898.

Brief of Dale & Dickson for Pet.

Filed Jan. 16, 1899.

IN THE

Supreme Court of the United States.

EX PARTE JOHN ROEHM.

Petition for Writ of *Certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court for its revision and determination the Writ of Error taken by John Roehm, a citizen of the State of Pennsylvania, against Paul R. G. Horst, a citizen of the State of New York, E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Brothers.

R. O. MOON,
RICHARD C. DALE,
SAMUEL DICKSON,
For the Petitioner.

Allen, Lane & Scott, Prs, Phila.

In the Supreme Court of the United States.

October Term, 1898. No.

EX PARTE JOHN ROEHM.

Petition for a writ of *certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination the writ of error taken by John Roehm, a citizen of the State of Pennsylvania, against Paul R. G. Horst, a citizen of the State of New York, E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Brothers.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of John Roehm, a citizen of the State of Pennsylvania, respectfully represents as follows:—

First.—Your petitioner is a citizen of the State of Pennsylvania.

Second.—An action was brought against your petitioner by the firm of Horst Brothers in the Circuit Court of the United States for the Eastern District of Pennsylvania, at Philadelphia, upon an alleged breach of contracts for the purchase and sale of hops. The case was heard under a stipulation waiving a jury, before the Hon. George M.

Dallas, Circuit Judge, who made a special finding of facts, which is found at page 20 of the record here filed, and upon the facts so found, gave judgment against your petitioner for the sum of $10,118.30. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Third Circuit.

Third.—The case having been heard before Acheson, Circuit Judge, and Butler and Kirkpatrick, District Judges, the opinion of the court was delivered on December 16th, 1898, by Kirkpatrick, J., affirming the judgment of the lower court. (Record, page 109.)

Fourth.—Upon August 25th, 1893, the firm of Horst Brothers and your petitioner entered into four written contracts, two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897. The following is a copy of one of the said contracts:—

"MEMORANDUM OF AGREEMENT made and entered into by and between *Horst Brothers*, doing business in the City of New York, parties of the first part, and *John Rochm*, parties of the second part, *Witnesses:*

"That the said parties of the first part agree to sell and deliver to the parties of the second part, and that parties of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered *ex* dock or store New York City, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

"If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition

shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

"*In witness whereof* the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

"HORST BROTHERS. (L. A. H.)
"JOHN ROEHM."

The others are identical in form except as to the time of shipment. Subsequently to the date of the said contracts, the firm of Horst Brothers was dissolved, and the retiring partner assigned to his copartners all his interest in the said contracts with your petitioner.

On June 27th, 1896, your petitioner wrote to the firm of Horst Brothers the following letter:—

"PHILADELPHIA, June 27, 1896.

"*Messrs. Horst Bros., 42 Pearl Street, New York City.*

"DEAR SIR:—Yours of the 23d inst. notifying me of the dissolution of the partnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific Coast hops of the crop of 1897, which, of course, you cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability on your part, to comply with the contracts.

"Yours truly,

"JOHN ROEHM."

In October, 1896, the plaintiff made the first shipment of twenty bales of hops required under the above contracts, and sent to your petitioner the invoice and bill of lading covering the same. On October 24th, 1896, your petitioner sent the following telegram and letter:—

"PHILADELPHIA, PA., October 24th, 1896.

"*Horst Brothers, San Francisco.*

"I decline to receive shipment of hops October ninth. Particulars by mail.

"JOHN ROEHM."

"PHILADELPHIA, October 24, 1896.

"*Messrs. Horst Brothers, No. 220 California St., San Francisco, California.*

"GENTLEMEN:—Yours of October 9th enclosing bill of lading and bill of particulars for 20 bales of hops, forwarded me under the terms of contract of August 25th, 1893, was received and I have wired you that I decline to receive the same.

"I notified you under date of June 27th, 1896, that owing to the dissolution of the copartnership with which I originally contracted, and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere.

"I am advised that I am under no obligation by that contract to accept supplies from you.

"If you desire to bill these goods at the current market rates *under a new contract*, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

"Very truly yours,

"JOHN ROEHM."

At the time of your petitioner's refusal to receive the shipment above mentioned, the trial judge found that the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of

nine cents per pound for prime Pacific Coast hops of the crop of 1896, and eleven cents per pound for like hops of the crop of 1897, and the difference between the price fixed by the contracts sued on, and those above mentioned, together with interest, amounted to $10,118.30, for which he ordered that judgment be entered as of the date of January 27th, 1898.

Fifth.—Your petitioner further shows that suit was brought upon January 23d, 1897, at which time the only hops deliverable under the contract were those under the first contract for one hundred bales, to be shipped at the rate of twenty bales per month, in the months of October, November, December, 1896, and January, 1897, and that at the time of the trial upon December 13th, 1897, the only hops deliverable were those covered by the first two contracts for hops of the crop of 1896, and the hops shipped under the third contract during the months of October and November, and possibly the month of December, for the crop of 1897, and that the deliveries of shipments made during the months of February, March, April, May, June, and July, 1898, were not deliverable at the time of the entry of judgment, upon January 27th, 1898.

Sixth.—Your petitioner further shows that upon the trial in the court below it was contended, on behalf of your petitioner, that the plaintiffs were not entitled to sue in October, 1896, for a breach of contracts which by their terms, did not mature until after suit brought, and that the measure of damage was the difference between the market and contract price at the time when deliveries should have been made and accepted. Both these contentions were overruled, and the plaintiffs were allowed to recover for the difference between the price at which forward contracts could have been obtained, and the contract price for all the deliveries under all the contracts.

Seventh.—Your petitioner further shows that the right to sue for an anticipatory breach of contract before the

time of performance has arrived, commonly spoken of as the rule in Hochster *vs.* de la Tour, has never been affirmed by your Honorable Court. On the contrary, when the question was brought before this court, in the case of Dingley *vs.* Oler, 117 U. S., 572, Mr. Justice Matthews, delivering the opinion of the court, referred to the rule as a novel doctrine, which had been disputed and denied by the Supreme Judicial Court of Massachusetts, and never applied by this court, and he added: "The construction we placed upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs."

Eighth.—Your petitioner further shows that the rule is one of very constant application, and although it is conceded that it has been very generally followed in the courts of this country and of England it is unquestionably true that the rule was not universally recognized as an innovation in the law of contracts at the time it was established, and that it was first applied in the case of a contract of service, and for a breach of a promise to marry, upon the ground that cases of that character were *sui generis*, and clearly distinguishable from the breach of ordinary contracts. Notwithstanding this, it has since been followed in all classes of contracts, but without any serious discussion of the principle upon which so important an exception is to be rested, and it would be in the highest degree interesting and instructive to the profession, throughout the entire country, if this court would now take up and deal with and finally dispose of this important question.

As a necessary sequence to the rule, it became necessary to introduce a further innovation in regard to the measure of damages. It has been universally held that the basis upon which damages are to be allowed, in an action for the breach of contract, is that of compensation, but as allowed in the present case, the plaintiffs were not only compensated but rewarded for the anticipatory breach, and the learned judge, in delivering the opinion of the

Court of Appeals, justifies the assessment of damages upon the ground that the defendant was a wrongdoer who was properly punished for his breach of contract. If the plaintiffs had, in point of fact, purchased the very forward contracts, which they offered testimony to prove that they could have secured, and had made deliveries thereunder in accordance with the terms of the contracts, they would not have received their intermediate profit until the maturity of each separate contract; but the learned court, instead of discounting the aggregate of these sums, so as to ascertain their cash value at the date of judgment, actually allowed interest from the time of the original renunciation.

Wherefore your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled John Roehm, plaintiff in error, *vs.* Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm of Horst Brothers, defendants in error, No. , to the end that the said case may be reviewed and determined by this court, as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray.

BRIEF OF ARGUMENT.

FIRST.

Of the Anticipatory Breach.

The principal question, of the right to maintain an action for a breach of contract before the time fixed for its per-

formance, is one of constantly recurring importance, and it is believed that the distinct refusal of this court, in Dingley *vs.* Oler, to affirm the rule first invented in Hochster *vs.* De la Tour, will excuse and justify this application.

In the Circuit Court his Honor Judge Dallas thus disposed of the question (pages 25, 26 of Record):—

"This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El. & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the Supreme Judicial Court of Massachusetts, declined to decide whether or not it should be maintained 'as applicable to the class of cases' to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

"In my opinion, the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be repeated at length, but I may remark that I concur with the learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are 'founded in good sense and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.'

"Since the decision of Dingley *vs.* Oler, the Circuit Court of Appeals for the Sixth Circuit has, in two cases (in both of which Dingley *vs.* Oler was cited) stated the law to be that—

"Where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms. * * * Brewing Co. *vs.* Bullock, 59 Fed., 87; Lumber Co. *vs.* Alley, 43 U. S. App.,

175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell in Dingely *vs.* Oler, as well as by the English authorities and by the judgments of the courts of several of the States."

In the opinion of the Court of Appeals, delivered by his Honor Judge Kirkpatrick, it is said:—

"Under these circumstances, the plaintiffs were justified in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract, and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 673, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *vs.* Van Eegan, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says: 'In view of the overwhelming preponderance of adjudication, we think it must be accepted as the settled law that where one party to an executory contract renounces it without cause, before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and if the latter elects to treat the contract as terminated, his right of action accrued at once.' That the right to begin an action carries with it the right to obtain judgment, needs no argument."

It would seem, therefore, that the question was treated as one controlled by the weight of authority, but it cannot be considered as settled in this country until finally disposed of by the Supreme Court of the United States.

In Dingley *vs.* Oler, 117 U. S., 572 (brief, page 14), the English cases are referred to by Mr. Justice Matthews as follows:—

"The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in Hochster *vs.* De la Tour, 2 El. & Bl., 678; Frost *vs.* Knight, L. R., 7, Ex. 111; Danube & Black Sea Railway Co. *vs.* Xenos, 11 C. B. N. S., 152, and which in Roper *vs.* Johnson, L. R., 8, C. P., 167, 178, was called a novel doctrine, followed by the courts of several of the States; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa,

409; Fox *vs.* Kitton, 19 Ill., 519; Chamber of Commerce *vs.* Sollitt, 43 Ill., 519; Dugan *vs.* Anderson, 36 Maryland, 567; Burtis *vs.* Thompson, 42 N. Y., 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in Daniels *vs.* Newton, 114 Mass., 530, and never applied by this court. Accordingly the right to maintain the present action was justified upon the principle supposed to be established by those cases.

"The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs; for, upon that construction, this case does not come within the operation of the rule invoked.

"In Smoot's Case, 15 Wall., 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed., 424; 2d ed., section 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient: it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made: for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'

"We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery *vs.* Bowden, 5 El. & Bl., 714; S. C., 6 El. & Bl., 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone *vs.* Milling, in the Court of Appeal, 16 Q. B. D., 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party."

Dingley *vs.* Oler, 117 U. S., 490, 502.

In Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, Judge Priest said:—

"The plaintiff then invokes the much-contested rule that where one of the parties to a contract of an executory character, before the time for performance, renounces it, or places himself in an attitude of impossibility of performance, the other may treat such action as a breach and sue at once as for a breach of the entire contract, although the time when he might require performance had not yet arrived. This view rests upon the reasoning and precedent of the case of Hochster *vs.* De la Tour, 3 El. & Bl., 678, and has never been approved or followed by the Supreme Court of the United States. All the intimations of that court are in opposition to such a rule.

"Thus in Smoot's Case, 15 Wall., 36-46, Mr. Justice Miller, speaking for the court, said:—

"'As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed.'

"In the subsequent case of Dingley *vs.* Oler, 117 U. S., 490. 6 Sup. Ct., 850, the disposition of the court, though not deciding the question, appears to be strongly in sympathy with the views of the Supreme Court of Massachusetts, so ably expressed in Daniels *vs.* Newton, 114 Mass., 530, upon a careful consideration of the more prominent of the preceding cases. The views of the Massachusetts court in the case *supra* appear to me to be more consonant with reason and the spirit of the law, and would in this case preclude any recovery by the plaintiff, upon the idea of a recovery as for a breach of the entire contract."

Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, 225.

On the other hand, it must be conceded that the State and Federal Courts have generally followed Hochster *vs.* De la Tour, and the cases are collated in the opinion of the Circuit Court of Appeals, Second Circuit, delivered by Judge Wallace, in the recent case of Marks *vs.* Vaneeghen, 85 Fed. Rep., 853.

It is believed that a careful examination of the two principal cases in which the rule was first invented will show that they were decided upon their own particular facts, and do not furnish a precedent for a controversy like the present.

Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, was the case of a courier. The contract was one for hiring for three months from June 1st, 1852, and on May 11th, 1852, the defendant wrote and declined the services of the plaintiff, who began his action May 22d, 1852. On the argument of the rule to enter a nonsuit or arrest of judgment, the plaintiff's counsel correctly said that the question was "whether it is possible to break a contract before the day for its performance comes."

It must be conceded that the weight of authority down

to that time was against the contention. The statement of the law by Baron Parke* in Phillpotts *vs.* Evans, 5 M. & W., 475, is conclusive as to what the law had been theretofore. That was a contract for the delivery of wheat, and the buyer gave notice that he would not accept. It was held that the measure of damages was the difference between the contract price and the market price on the day of tender, and not on the day of receiving notice. Mr. Baron Parke said (page 477):—

"If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damage would be according to the price at the time of the notice. *But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and,* vice versa, *the plaintiffs could not sue him before.* The same rule was adopted in the case of Startup *vs.* Cortazzi, 2 C. M. & R., 165. The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract. I think, therefore, that the damages have been calculated according to the proper principle, and that there should be no rule."

The opinion of the court in Hochster *vs.* De la Tour was delivered by Lord Campbell, and the true *ratio decidendi* is to be found at pages 69, 70, as follows:—

"If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise 'to start with the defendant on such travels on the day and year,' and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agree-

---

* "Probably the most acute and accomplished lawyer this country ever saw."—Lord Blackburn, L. R., 7 C. P., 554.

ment by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract."

In other words, it would be extremely hard upon the plaintiff, and really prejudicial to the defendant, that the action should not be brought in advance of the time of performance, as otherwise the servant would be obliged to remain in idleness in order to prove his readiness to perform, and no possible wrong could be done to the defendant except that if the time of service under the contract had not expired before suit brought, the plaintiff might recover full damages, and afterwards secure employment from another master. Whether the reason given be good or bad, the rule there established was a perfectly plain case of judge-made law.

The question was incidentally considered and the doctrine recognized in the case of the Danube and Black Sea Company *vs.* Xenos, 11 C. B. N. S., 103, E. C. L., 152, though the refusal was continued and the suit was not brought till after the date of the performance; but there was no discussion of the subject in the opinion, either in the Court of Common Pleas or in the Exchequer Chamber.

The question next arose in Frost *vs.* Knight, which came before the Court of Exchequer upon a rule for a new trial, in L. R., 5 Ex., 322. That was an action for breach of promise to marry on the death of the defendant's father, who was still alive at the time of trial. In the Exchequer, Chief Baron Kelly delivered an opinion which was certainly not answered by Chief Justice Cockburn, but which has been comparatively lost sight of. He prefaces his argument as follows:—

"Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened is not broken by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only; a possible breach, which may never occur, and not an actual breach. * * * To say that the contract is broken is simply to utter

an untruth. One contracts in 1870 to pay to another £1000 on the 1st January, 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and uncontrovertible in fact that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive. Yet these decisions have now made it law that a promise to do an act at a future day, or upon an event which has not yet occurred, is broken by a declaration to the promisee that it will be broken or will not be performed. And we are bound by these decisions, one of them having been pronounced in the Exchequer Chamber. It is necessary, therefore, to consider whether their authority extends not only to the contracts to which they related, and others of the like nature, but to a contract of a totally different character and peculiar to itself, like a contract to marry."

He next discusses the cases to which Lord Campbell had referred, and concludes that—

"The judgment as delivered by Lord Campbell will be found, when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered to him, and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement."

He then proceeds to show that Hochster *vs.* De la Tour was "not only unsupported by any previous authority, but directly opposed to the principle of several cases to which it is now necessary to advert."

In the Exchequer Chamber, L. R., 7 Ex., 111, the opinion was delivered by Chief Justice Cockburn, who thus explains Hochster *vs.* De la Tour, pages 113, 115:—

"The considerations on which the decision in Hochster *vs.* De la Tour, 2 E. & B., 678, is founded are that the announcement of the contracting party of his intention not to fulfill the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

"It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster *vs.* De la Tour proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

"It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor and taking timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

He further points out that a promise to marry creates a *status* or condition of betrothment, and this view is enforced by Mr. Justice Byles, in his concurring opinion, who contended that the breaking off of a mutual engagement to marry amounted to a breach of contract by putting an end to the condition of betrothment, which, according to the contract, was to continue.

These cases might very well, therefore, be sustained upon their particular facts as exceptions to the general rule; but the assertion by the Chief Justice that "a party to the contract has the right to have it kept open as a subsisting and effective contract," is unsustained by authority and entirely inconsistent with principle. Even in these cases the measure of damage is still said to be the compensation for the refusal to perform at the time fixed by the contract, and no one has ever suggested that the measure of damages for an anticipatory breach differed, except in so far as in one case the jury would be obliged to guess, whereas in the case of an actual breach they would be able to base their verdict upon facts instead of conjecture. The illustration of Mr. Justice Wells, in his opinion in Daniels *vs.* Newton, 114 Mass., 530, 532, of the case of commercial paper, is unanswerable. No renunciation of his obligation to meet his note would render the maker liable before the day fixed for payment, and, upon principle, it is impossible to distinguish between a promise to pay negotiable paper and the promise to pay for goods when and as delivered. The opinion of Mr. Justice Wells contains a thorough discussion of all of the authorities down to date, and he concludes by saying:—

"Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed."

* * * * * * * *

"That this is the natural and ordinary rule seems to be recognized by Lord Campbell when he declares that 'it cannot be laid down as a universal rule,' and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true 'that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived.' L. R., 7 Ex., 114. But a preceding 'inchoate right' is discovered, and a corresponding obligation implied, upon which there may be held to be a 'breach of the contract when the promisor repudiates it and declares he will no longer be bound by it.'"

* * * * * * * *

"These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and, so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement, 'by reason of the future non-performance,' will be 'virtually involved,' 'as one of the consequences of the repudiation of the contract,' it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts having a future day for their performance include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfillment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days, at least, within which to fulfill their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action, therefore, cannot be maintained."

Daniels *vs.* Newton, 114 Mass., 530-539.

In other cases, both in England and in this country, the judges have contented themselves with treating the

two leading English cases as binding authorities, and there has been no serious consideration of the question upon principle and no critical discussion of the authorities. Extracts from the opinions are given in the foot note of all which go beyond the mere citation of the two leading English cases.*

The learned Circuit Judge says that in his opinion the argument in Daniels *vs.* Newton is well and sufficiently answered by Judge Lowell in Dingley *vs.* Oler, 11 Fed. Rep., 372, but upon a careful examination of the opinion of Judge Lowell it will not be found to merit this high

---

* In Holloway *vs.* Griffith, 32 Iowa, 409—an action for an anticipatory breach of contract to marry—the court adhered to its earlier decision in 19 Iowa, 179, saying: "The rule we deem sound and just, and too well settled to be now called in question."

In Grau *vs.* McVicker, 8 Bissell, 13, 16, which was an action upon a contract of lease, Drummond, J., says:—

"The second objection, as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he could not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or, as it is called in the books, a *locus pœnitentiæ*. Some authorities declare that in law there is this *locus pœnitentiæ*, and that a party shall have a chance to recant, and say, 'I was wrong, but when the time comes I will perform my contract.' Undoubtedly, there are authorities which declare that there cannot be a breach of contract, strictly so-called, until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the contrary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine in the midst of the conflict of authority upon this subject whether, in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874, and I have come to the conclusion that there may be such breach.

"I think that the principles decided in the case of *Hochster* vs. *De la Tour*, reported in the 20th English Law and Equity Reports, 57, are sound. * * * The unanimous opinion of the court was that the

commendation. Alluding to the suggested case of the negotiable note, he admits that it would be difficult to apply the rule or to find any damages in a case of the extreme simplicity and singleness of that supposed, but he offers really no argument in support of his decision.

The illustration drawn from the case of negotiable paper is, however, a conclusive answer in all cases of ordinary commercial contracts. Take an executory contract to sell, where the buyer gives his notes in advance, payable, successively, at the dates of deliveries. Would it be contended that suit can be brought either on the notes or on the con-

---

action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case, and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make—whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not

tract immediately upon a renunciation in advance of the obligation to take the goods and pay the notes? But if not, it is impossible to distinguish such a case on the one hand from the giving of a promissory note, without more, or from an agreement to pay the price, without more, as usually expressed in an ordinary contract of sale.

When the promise is nothing but a promise to pay money, it is plain to every lawyer that the announcement of an intention not to perform that promise can give no new rights to the promisee, because he has nothing to do but to receive payment—and Judge Lowell apparently

---

have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary, it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup."

In Burtis *vs.* Thompson, 42 N. Y., 246, 250, Grover, J., said:—

"Any conduct by a party who has promised to marry another that will render the contract no longer obligatory upon that other, is a violation of the duty and obligation created by the contract, and may therefore be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act. Annoying and distressing the feelings of the plaintiff in this way, whether the defendant was in earnest or not, fully justified the plaintiff in treating the contract as broken by the defendant. The plaintiff's (defendant's ?) counsel insists that if this is the law to be applied in the present case, it will follow that the maker of a note due at a future day will make himself liable to an action instantly by declaring to the holder that he will never pay it. This conclusion does not at all follow. *In the case of such a note, the holder is in no respect damnified until payment is withheld after it is due. Until this happens, no legal right of his has been violated by the maker.* Not so in the present case. The defendant in a legal sense had rendered it certain that the plaintiff had lost absolutely all benefit to be derived by her from the contract. He had wrongfully caused her all the distress of wounded feelings that a breach by him at the day would inflict, which is an essential consideration in estimating her damages. In Hochster *vs.* De la Tour (20 Eng. L. & Eq.), it was held that a party who had contracted with another to enter his service as a carrier (*sic*) on the first day of June thereafter,

concedes this—but it is entirely sufficient for the protection of the party receiving such a notice in every other case, to relieve him from the duty of performance on his part without creating a new contract by accelerating the day of performance and payment. What consideration does he give for the creation of new rights and the imposition of new liabilities, and upon what principle is it that it is left optional with him to retain the old contract or make a new one at his pleasure? The rule heretofore was that upon notice of repudiation he might rescind, in which case the mutual promise was a consideration, or at his election

---

became liable to an action before that day by giving notice of his refusal to employ him according to the contract. While not fully prepared to concur in the judgment in this case without further consideration, yet the reasoning of the learned judge, when applied to the facts in the present case, clearly shows the correctness of the charge upon the point under consideration."

In Howard *vs.* Daly, 61 N. Y., 362, an action for breach of contract of service, Professor Dwight, acting as commissioner of appeal, reviews the English cases, and concludes that "the rule in Hochster *vs.* De la Tour is universal in its application to contracts to be performed at a future day," but adds, "I presume it would scarcely be extended to mere promises to pay money or other promises of that nature, where there are no mutual stipulations."

The question was incidentally involved in Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442-446, where the reasoning of Hare, J., is against the right to maintain the action in the present case, although he expresses the opinion that the rule of Frost *vs.* Knight will prevail in the United States. He says:—

"*It is no doubt true in general that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace, and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-performance is not an injury until the time for fulfillment has expired.* If a man removes or converts the goods of another, the latter may proceed at once in trover or replevin; and so when a vendor refuses to deliver the goods, notwithstanding a tender of the price. In like manner a man who shoul I promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debtor *assumpsit*."

he might enforce; but to allow him to recover damages for the breach of the contract in advance of the time of performance, is to give him more than compensation, and to impose more than damages upon his adversary.

It should be further pointed out that the rule relieves the seller from all risk and cost. If nothing had occurred leading the defendant to decline to take the hops, the plaintiffs would have been bound, even if they had made forward contracts, to run the risk of performance on the part of their vendors. Dealing in a commodity, of fluctuating value, there would have been constantly the risk in respect to solvency and the willingness to deliver. Assuming a contract running over many years, the obligation of a vendor in California or the Philippines would be of very uncertain value, and yet, according to the rule adopted by the learned judge, the seller may relieve himself from all risks of non-performance on the part of his vendors, without even going to the trouble of making a formal contract, and prove that he could have bought at the bottom of the market, and thereby establish a standard of value. This is to put the plaintiffs in a far better position than if the contract had been performed, and to reward them for having the contract broken; and this, too, in the face of the fact that they unquestionably would have the right, under the authorities, to refuse to acquiesce in the renunciation, and to hold the contract open until the time of performance.

It may also be observed that the adoption of the rule in cases like the present, gives to the plaintiff in actual practice much more than he is entitled to have. In fixing the contract price for forward deliveries, the vendor must always charge for the risks of the market, and the other risks of business, while the defendant had certain chances to the benefit of which he was lawfully entitled. The vendor ran the risk of not being able to buy the article he had contracted to deliver, or of loss in transportation, and of the ultimate solvency of the buyer, all of which risks entered into the price. All these chances are eliminated, and the defendant, instead of being called upon to pay the

damages fairly resulting from his refusal to take each successive delivery, is required to make a lump payment in advance, covering the aggregate estimated losses. This is giving the vendor more than compensation, and depriving the purchaser of the chances to which he is entitled, of being relieved from an onerous and oppressive bargain. In a proper case, notice of a refusal to accept may excuse failure to perform, as prevention is always an answer to the plea of the want of readiness to perform; but as the action for an anticipatory breach is avowedly intended to put the parties in the same condition as they would have been in upon a failure to perform at the maturity of the contract, there is no collateral reason, as in the case of a servant, or of the betrothed woman, to give this compensation before the aggrieved party is entitled to it by the terms of his contract.

SECOND.

OF THE MEASURE OF DAMAGES.

In discussing the measure of damages, Judge Kirkpatrick says:—

"In an action upon an ordinary contract for sale and present delivery, the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that this is not a general, invariable rule is apparent from the fact that it cannot be made to serve as a measure of damages in a case like the one at bar, where there is need for an immediate ascertainment, though delivery, by the terms of the contract, was not to be made until after the rendition of the judgment. The rule was no doubt adopted because in cases where applicable, it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case, other means must be employed, the courts do not hesitate to adopt a different rule. Thus, in Huntley *vs.* the Pittsburg Bessemer Steel Company, 121 U. S., 264, where a contract was made for steel rails of a particular kind, which the plaintiffs were prevented from manufacturing and delivering by the misconduct of the defendant, the court held that 'the proper rule of damages was the difference between the cost per ton of making and delivery and the contract price.'

"The basis of recovery was said to be the gain which the plaintiff would have had if permitted to complete the contract. The damages

of the plaintiffs in this case should be assessed upon the same principle—that of the gain there was to him in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops delivered according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The objection on the part of the plaintiff (defendant) that he was entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made necessary an antecedent ascertainment of the damages, and is bound to accept the situation caused by his own wrongdoing. Anvil Mining Co. *vs.* Humble, 153 U. S., 540.

"The record shows at what price such subcontracts as above referred to were obtainable, and judgment was rendered in accordance therewith."

It has always been recognized that in an action for an anticipatory breach of contract it is extremely difficult to arrive at the true measure of damages. In the case of the servant, the jury must guess as to his chances of obtaining employment. In fact, in Hochster *vs.* De la Tour he had secured a new engagement before trial. In the case of the betrothed woman they would be obliged to guess as to her chances of getting married in the interval, but that would be no more difficult than in the ordinary case of an actual breach, when the chances of future marriage should always be taken into account.

But in the ordinary action for failure to take and pay for goods the measure of damages is the difference between the contract and market price, of which the best evidence is a public sale, or a sale in the regular course of trade at the full market rate, after notice. In such a case the goods must be shown to be of the quality contracted for, and the price obtained upon resale is, of course, a fair test of market value. The difference between what the plaintiff gets from the resale and the contract price is exactly and precisely the compensation to which he is entitled. The verdict puts him exactly where he would have been if the purchaser had taken and paid for the goods.

In Brown *vs.* Muller, L. R., 7 Ex., 319, the plaintiff bought iron, to be delivered in about equal proportions

in September, October, and November. In August the defendant gave notice that he did not intend to deliver. In December the plaintiff began his action for non-delivery, and it was held that the proper measure of damage was the difference between the contract and market prices of one-third of five hundred tons on the 30th of September, the 31st of October, and the 30th of November respectively.

Chief Baron Kelly said:—

"It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or, at all events, when the first breach took place and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or, again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible."

Brown *vs.* Muller, L. R., 7 Ex., 319-322.

In Roper *vs.* Johnson, also (L. R., 8 C. P., 167), it was contended by the counsel for the defendant that the plaintiff should have gone into the market immediately upon

the breach and obtained a similar contract. It will be observed that the action was by the buyer for refusal to deliver. In the course of the opinion of the court it is intimated that the defendant might have given evidence that another contract might have been obtained on better terms on the day of the notice of the refusal to accept, but that in the absence of such evidence the true measure of damage was the market price upon the day appointed for performance. The remarks of Mr. Justice Brett are so directly in point that they may be quoted at length:—

"This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times, and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods the rule as to damages for breach of the contract to deliver is the difference between the contract price and the market price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown *vs.* Muller, Law Rep., 7 Ex., 319, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that the contract being wholly unperformed, there is a breach—a partial breach—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of the several portions of the contract. But the case of Hochster *vs.* De la Tour, 2 E. & B., 678, 22 L. J. (Q. B.), 455, introduced this qualification, that where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here, the contract being for the delivery of the goods on future specified days, the defendant has, before the time appointed for the last delivery, declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

"Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. These are two quite distinct. All that Hochster *vs.* De la Tour, 2 E. & B., 678; 22 L. J. (Q. B.), 455, decided was this, that if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position

from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of breach. It appears to me that what is laid down by Cockburn, C. J., in Frost *vs.* Knight, in the Exchequer Chamber Law Rep., 7 Ex., 111, involves the very distinction which I am trying to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages: *and that when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach.* Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: 'The promisee, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.' He then treats of the other case: 'On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time,' that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., *that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract.* Then he goes on and shews the real distinction between the cases he has put, 'Subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss.' He says further: 'The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause

of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract: and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done whereby his loss has been or would have been diminished.' He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz., 'ought to have done.' It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages: leaving it to the defendant to shew circumstances which would entitle him to a mitigation. No such circumstances appeared here; there was nothing to shew that the plaintiffs ought to have or could have gone into the market, a rising market, and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was upon precisely the same argument that the Chief Baron in Brown *vs.* Muller, Law Rep., 7 Ex., 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance; but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority I should have come to the same conclusion. But I think we are bound by the authority of Frost *vs.* Knight, Law Rep., 7 Ex., 111, and Brown *vs.* Muller, Law Rep., 7 Ex., 319."

As already noted, the action in Roper *vs.* Johnson was by the buyer for refusal of the seller to deliver the coal he had agreed to furnish. What is said as to the possibility of the defendant mitigating the damages by offering evidence to prove that the plaintiff could have provided himself with other forward contracts is purely *obiter*, but rests on the familiar rule that the party aggrieved must reduce the damages so far as possible. The plaintiffs claimed that they needed the coal for consumption, and

it was argued that it was their duty to supply themselves by taking contracts at lower prices, if able to do so, but it is difficult to see why they had not the right to take the risk of the market and to defer supplying themselves from month to month until the coal was actually needed. What was actually decided was, that if evidence could have been produced to prove that forward contracts could have been obtained, the burden rested upon the defendant to prove the fact, but it was not decided that if such evidence had been tendered it would have been competent, and in the opinion of Kelly, C. B., it would not have been.*

But the case of the buyer who needs goods for use and neglects to provide himself elsewhere, and to mitigate the damages, when the chance offers, is very different from the present, where the seller claims that he could have bought forward contracts in advance, and could have thus qualified himself to make the deliveries as they would have become due. This is for the purpose of aggravating, not of mitigating, the damages. According to the contract, the extent of the buyer's obligation was to take the goods as delivered, at the times and in the amounts stipulated, or to pay the difference between the contract price and what the seller could get for them from some one else upon a resale at the full market price. He is entitled to the benefit of the market at each due date, and *non constat* that the market might not advance so as to make the loss nominal. In fact, the price allowed for the crop of 1897 was two cents higher than for that of 1896, and the evidence showed that the lowest prices ruled in the Summer of 1896, after which time there had been a steady advance.

In his opinion the learned judge of the Court of Appeals does not meet, or even discuss, the objection that the plaintiffs were given their money before the date called for by the contract. It does not matter whether the defendant is a wrongdoer or not. The only damages which

* In the case of L. S. & M. S. Ry. Co. *vs.* Richards, 152 Ills., 59, however, the question came up for decision, and it was *held* that the vendor, not being bound to accept the notice of renunciation, was not required to resell the grain on hand or make a forward contract, but might treat the contract as still in force.

the plaintiffs could recover for the breach of their contract would be an amount sufficient to give them compensation, or, in other words, to put them in precisely the same position which they would have been in if the contract had been performed.

If the contract had been performed, they would not have received the purchase money until the time of payment according to the contract, and the final payment could not have been had until the tenth day of August, 1898. It is obvious, therefore, that assuming that the computation of damages was correct in all other respects, the plaintiffs were only entitled to insist on the payments which should have been made down to the date of judgment, and the defendant was entitled to a discount on all future payments down to August 10th, 1898, for the simple reason that the plaintiffs were not entitled to get their profits until the time of actual delivery. The contract price was twenty-two cents per pound, and the average damages allowed were twelve cents per pound, or twelve twenty-seconds or six-elevenths of the contract price, so that the plaintiffs were awarded six-elevenths of the contract price as of October 24th, 1896, though the last installment was not due under the contract till August 10th, 1898. It is very apparent, also, that as at the time of the refusal to accept the first tender in October, 1896, the market was at the lowest point, and prices continued to advance down to August, 1898, the plaintiffs have been allowed to recover and the defendant compelled to pay a sum far beyond what would have compensated the plaintiffs for the actual breaches of the different contracts as they matured, and if, in addition, the defendant is required to make this payment months before the money was due according to the contract, the dangers and mischiefs of judge-made law will be manifest.

It may be incidentally remarked that the court was plainly in error in holding that the four contracts written upon four separate papers, calling for payment as each delivery was made, constituted an entire contract. They are, in fact, the very type of the divisible contract, each in itself independent, calling for the delivery of a separate

installment, and the payment for the parcel when and as delivered. The plaintiffs had no right, therefore, to include all in one suit, when only one had been broken at the time the writ issued. A renunciation of one contract cannot constitute an anticipatory breach of subsequent and independent contracts.

R. O. MOON,
R. C. DALE,
SAMUEL DICKSON,
For Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

John Roehm, Plaintiff in Error,

vs.

Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

October Term, 1899.

No. 198.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN BEHALF OF JOHN ROEHM, PLAINTIFF IN ERROR.

I. HISTORY OF THE CASE.

This action was instituted at law in the Circuit Court of the United States for the Third Circuit, at Philadelphia, by Paul R. G. Horst and others, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, as plaintiffs, against John Roehm, as defendant. The case was heard under a stipulation waiving a jury, before the Hon. George M. Dallas, Circuit Judge, who made a special finding of facts, and upon the facts so found gave judgment for the plaintiffs. A writ of error was prosecuted by the defendant

in the Circuit Court of Appeals for the Third Circuit, and the judgment of the lower court was affirmed. Thereupon John Roehm filed in this court a petition for a writ of *certiorari*, which was granted (Record, page 97), and thus the cause comes on for hearing.

II. ABSTRACT OF THE PLEADINGS.

The plaintiff filed a statement of demand (Record, page 6 *et seq.*), reciting *in hæc verba* four written contracts made on August 25th, 1893, two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897. The first contract called for one hundred bales of the crop of 1896, to be shipped twenty bales per month in the months of October, November, December, January, and February. The second contract called for the same number of bales of the crop of 1896, to be shipped twenty bales per month in the months of March, April, May, June, and July. The third contract called for one hundred bales of the crop of 1897, to be shipped twenty bales each month in the months of October, November, December, January, and February. The fourth contract called for one hundred bales of the crop of 1897, to be shipped at the rate of twenty bales each month in the months of March, April, May, June, and July. The statement alleged that the hop crop is gathered in the Summer, and the months named in the contracts were the months next after the Summer months of the year of the crop.

On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners all his interest in the contracts. Upon receiving notice of the dissolution of the firm, the defendant wrote, under date of June 27th, 1896, stating that he considered the contracts as annulled. The plaintiffs replied, in effect, that the firm would perform its contracts, and in

October, 1896, made the first shipment and sent the defendant the invoice and bill of lading. Under date of October 24th, 1896, the defendant replied that he declined to receive the shipment.

The statement further alleges that the market price in New York City on that day of hops of the crop of 1896, deliverable as specified in the contracts, was seven and one-half cents per pound, and the market price on that day of hops of the crop of 1897, deliverable as specified in the contracts, was nine and one-half cents a pound, and claimed the difference between the alleged market price and the contract price.

The defendant pleaded "*Non assumpsit.*" (Record, page 15.)

III. SPECIAL FINDING OF FACTS.

(Record, pages 16-20.)

The learned judge found that the parties had entered into the contracts recited in the statement, but that when the first shipment of twenty bales had been tendered, in October, 1896, the defendant had declined to receive the hops, and further finds (Record, page 19) as follows:—

"At the time the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for 'prime Pacific Coast hops of the crop of 1896, and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the contracts sued on and these above stated, together with interest on the sum of such differences from October 24th, 1896, to this date, are as follows:—

"Difference between contract price, 22 cents per pound, and 9 cents per pound on 200 bales, 39,200 pounds, at 13 cents per pound	$5,096 00
"Difference between contract price, 22 cents per pound, and 11 cents per pound on 200 bales, 39,200 pounds, at 11 cents per pound	4,312 00
"Interest from October 24th, 1896, to January 27th, 1896	710 30
"Total	$10,118 30

IV. ASSIGNMENTS OF ERROR.

(Record, page 88.)

First.—The learned judge erred in holding that a right of action had accrued to the plaintiff with respect to all the contracts in question at the time this suit was brought.

Second.—The learned judge erred in holding that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and therefore must be the correct measure of the damages recoverable.

Third.—The learned court below erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $10,118.20.

V. BRIEF OF ARGUMENT.

FIRST.

Of the Anticipatory Breach.

This action was brought for the recovery of damages for the alleged breach of four separate, distinct, and independent contracts of sale, upon the refusal to accept delivery of a single one of five parcels under the first contract, and before the time for final performance had arrived. At the time of suit, January 23d, 1897 (Record, page 2), four parcels were to have been delivered and accepted, and at the time of trial, December 13th, 1897 (Record, page 3), the only parcels deliverable up to that time were those covered by the first two contracts for hops of the crop of 1896 and two parcels for the crop of 1897. The trial judge felt that it was his duty to follow the rule first established in Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, and to allow a recovery for breaches of contract to accept and pay for goods before the time fixed by the contract for their delivery.

It is conceded that this ruling is in accordance with the decisions of the English courts and of the courts of many of the States in this country, but it has never yet been sanctioned and adopted by this court.

In the Circuit Court, Judge Dallas thus disposed of the question (Record, pages 21, 22):—

"This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the Supreme Judicial Court of Massachusetts, declined to decide whether or not it should be maintained 'as applicable to the class of cases' to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

"In my opinion, the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be repeated at length, but I may remark that I concur with the learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are 'founded in good sense and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.'

"Since the decision of Dingley *vs.* Oler, the Circuit Court of Appeals for the Sixth Circuit has in two cases (in both of which Dingley *vs.* Oler was cited) stated the law to be that—

"'Where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms. * * * Brewing Co. *vs.* Bullock, 50 Fed., 87. Lumber Co. *vs.* Alley, 43 U. S. App.,

175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell in Dingley *vs.* Oler, as well as by the English authorities and by the judgments of the courts of several of the States."

In the opinion of the Circuit Court of Appeals, delivered by his Honor Judge Kirkpatrick (Record, pages 92-96), it is said:—

"Under these circumstances, the plaintiffs were justified in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract, and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 673, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *vs.* Van Eegan, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the Circuit Court of Appeals for the Second Circuit, says: 'In view of the overwhelming preponderance of adjudication, we think it must be accepted as the settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated, without prejudice to a right of action for damages, and if the latter elects to treat the contract as terminated, his right of action accrued at once.' That the right to begin an action carries with it the right to obtain judgment, needs no argument."

In Dingley *vs.* Oler, 117 U. S., 490, Mr. Justice Matthews says (at page 502):—

"The view taken by the Circuit Court of the correspondence and conduct of the parties, and which we hold to be erroneous, brought the case within the rule laid down by the English courts in Hochster *vs.* De la Tour, 2 El. & Bl., 678; Frost *vs.* Knight, L. R., 7, Ex., 111; Danube & Black Sea Railway Co. *vs.* Xenos, 11 C. B. N. S., 152, and which in Roper *vs.* Johnson, L. R., 8, C. P., 167, 178, was called a novel doctrine, followed by the courts of several of the States: Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Chamber of Commerce *vs.* Sollitt, 43 Ill., 519; Dugan *vs.* Anderson, 36 Maryland, 567; Burtis *vs.* Thompson, 42 N. Y., 246, but disputed and denied by the Supreme Judicial Court of Massachusetts in Daniels *vs.* Newton, 114 Mass., 530, and never applied by this court. Accordingly the right to maintain the

present action was justified upon the principle supposed to be established by those cases.

"The construction we place upon what passed between the parties renders it unnecessary for us to discuss or decide whether the doctrine of these authorities can be maintained as applicable to the class of cases to which the present belongs: for, upon that construction, this case does not come within the operation of the rule invoked.

"In Smoot's Case, 15 Wall., 36, this court quoted with approval the qualifications stated by Benjamin on Sales, 1st ed., 424; 2d ed., section 568, that 'a mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient: it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end.'

"We do not find any such refusal to have been given or acted upon in the present case, and the facts are not stronger than those in Avery *vs.* Bowden, 5 El. & Bl., 714; S. C., 6 El. & Bl., 953, which were held not to constitute a breach or renunciation of the contract. The most recent English case on the subject is that of Johnstone *vs.* Milling, in the Court of Appeal, 16 Q. B. D., 460, decided in January of the present year, which holds that the words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it, and that that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party."

Dingley *vs.* Oler, 117 U. S., 490, 502.

The question has come several times before the other Federal courts of the country, and in Marks *vs.* Vaneeghen, 85 Fed. Rep., 853 (57 U. S. Appeals, 149), Wallace, C. J., said:—

"It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once. The latter, how-

ever, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvary, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Sloss Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

"In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action."

Again, in

Pierce *vs.* Railroad Co., 173 U. S., 1, 12,

Mr. Justice Gray says:—

"It is proper to remark that the point decided in Daniels *vs.* Newton, 114 Mass., 530, was left open in Dingley *vs.* Oler, 117 U. S., 490, 503, and has never been brought into judgment in this court."

On the other hand, in Clark *vs.* The National Benefit and Casualty Co., 67 Fed. Rep., 222, Judge Priest said:—

"The plaintiff then invokes the much-contested rule that where one of the parties to a contract of an executory character, before the time for performance, renounces it, or places himself in an attitude of impossibility of performance, the other may treat such action as a breach and sue at once as for a breach of the entire contract, although the time when he might require performance had not yet arrived. This view rests upon the reasoning and precedent of the case of Hochster *vs.* De la Tour, 3 El. & Bl., 678, and has never been approved or fol-

lowed by the Supreme Court of the United States. All the intimations of that court are in opposition to such a rule.

"Thus in Smoot's Case, 15 Wall., 36-46, Mr. Justice Miller, speaking for the court, said:—

"'As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed.'

"In the subsequent case of Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, the disposition of the court, though not deciding the question, appears to be strongly in sympathy with the views of the Supreme Court of Massachusetts, so ably expressed in Daniels *vs.* Newton, 114 Mass., 530, upon a careful consideration of the more prominent of the preceding cases. The views of the Massachusetts court in the case *supra* appear to me to be more consonant with reason and the spirit of the law, and would in this case preclude any recovery by the plaintiff, upon the idea of a recovery as for a breach of the entire contract."

Clark *vs.* National Benefit & Casualty Co., 67 Fed. Rep., 222, 225.

While it is true that the English rule has been frequently approved by the courts of this country, it is a little remarkable that, with two or three exceptions, to which attention will be hereafter particularly called, there has not been, in any of the opinions, a careful discussion of the question upon principle, and it is submitted, therefore, that the rule should not be adopted by this court without an examination of the reasons given by its authors at the time of its invention. It is believed that it will be found that the innovation was first made in cases of an exceptional character, for reasons applicable to the peculiar facts then involved, and it was then incorporated into the general law of executory contracts, without adverting to the exceptional reasons which had originally suggested it.

Hochster *vs.* De La Tour, 2 Ell. & Bl., 678, was the case of a courier The contract was one for hiring for three months from June 1st, 1852, and on May 11th, 1852, the defendant wrote and declined the services of the plaintiff, who began his action May 22d, 1852. On the argument

of the rule to enter a nonsuit or arrest of judgment, the plaintiff's counsel correctly said that the question was "whether it is possible to break a contract before the day for its performance comes."

It must be conceded that the weight of authority down to that time was against the contention. The statement of the law by Baron Parke* in Phillpotts *vs.* Evans, 5 M. & W., 475, is conclusive as to what the law had been theretofore. That was a contract for the delivery of wheat, and the buyer gave notice that he would not accept. It was held that the measure of damages was the difference between the contract price and the market price on the day of tender, and not on the day of receiving notice. Mr. Baron Parke said (page 477):—

"If Mr. Richards could have established that the plaintiffs, after the notice given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damage would be according to the price at the time of the notice. *But I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of contract; for all that he stipulates for is, that he will be ready and willing to receive the goods, and pay for them, at the time when by the contract he ought to do so. His contract was not broken by his previous declaration that he would not accept them; it was a mere nullity, and it was perfectly in his power to accept them nevertheless; and,* vice versa, *the plaintiffs could not sue him before.* The same rule was adopted in the case of Startup *vs* Cortazzi, 2 C. M. & R., 165. The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract. I think, therefore, that the damages have been calculated according to the proper principle, and that there should be no rule."

The opinion of the court in Hochster *vs.* De la Tour was delivered by Lord Campbell, and the true *ratio decidendi* is to be found at pages 69, 70, as follows:—

"If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise 'to start with the defendant on such

* "Probably the most acute and accomplished lawyer this country ever saw."—Lord Blackburn, L. R., 7 C. P., 554.

travels on the day and year,' and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract."

In other words, it would be extremely hard upon the plaintiff, and really prejudicial to the defendant, that the action should not be brought in advance of the time of performance, as otherwise the servant would be obliged to remain in idleness in order to prove his readiness to perform, and no possible wrong could be done to the defendant except that if the time of service under the contract had not expired before suit brought, the plaintiff might recover full damages, and afterwards secure employment from another master. Whether the reason given be good or bad, the rule there established was a perfectly plain case of judge-made law.

The question was incidentally considered and the doctrine recognized in the case of the Danube and Black Sea Company *vs.* Xenos, 11 C. B. N. S., 103, E. C. L., 152, though the refusal was continued and the suit was not brought till after the date of the performance; but there was no discussion of the subject in the opinion, either in the Court of Common Pleas or in the Exchequer Chamber.

The question next arose in Frost *vs.* Knight, which came before the Court of Exchequer upon a rule for a new trial, in L. R., 5 Ex., 322. That was an action for breach of promise to marry on the death of the defendant's father, who was still alive at the time of the trial. In the Exchequer, Chief Baron Kelly delivered an opinion which was certainly not answered by Chief Justice Cockburn, but which has been comparatively lost sight of. He prefaces his argument as follows:—

"Nothing can be more certain, as a matter of fact, than that a promise to marry upon an event which has not yet happened is not broken

by the defendant declaring that he will not perform his promise. If it can be called a breach at all, it is a promissory or prospective breach only: a possible breach, which may never occur, and not an actual breach. * * * To say that the contract is broken is simply to utter an untruth. One contracts in 1870 to pay to another £1000 on the 1st January, 1871. To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and unconvertible in fact that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive. Yet these decisions have now made it law that a promise to do an act at a future day, or upon an event which has not yet occurred, is broken by a declaration to the promisee that it will be broken or will not be performed. And we are bound by these decisions, one of them having been pronounced in the Exchequer Chamber. It is necessary, therefore, to consider whether their authority extends not only to the contracts to which they related, and others of the like nature, but to a contract of a totally different character and peculiar to itself, like a contract to marry."

He next discusses the cases to which Lord Campbell had referred, and concludes that—

"The judgment as delivered by Lord Campbell will be found, when carefully considered, to amount to no more than an argument upon the reasonableness of affording some remedy to the plaintiff, where, by reason of the declaration of the defendant that he would not take him into his service when the 1st of June should arrive, he was obliged either to remain unemployed until the 1st of June and lose the opportunity of obtaining another engagement, or to accept any other engagement that might be offered to him, and so disentitle himself to maintain an action, on the ground that he could not aver that he was ready and willing to perform his part of the agreement."

He then proceeds to show that Hochster *vs.* De la Tour was "not only unsupported by any previous authority, but directly opposed to the principle of several cases to which it is now necessary to advert."

In the Exchequer Chamber, L. R., 7 Ex., 111, the opinion was delivered by Chief Justice Cockburn, who thus explains Hochster *vs.* De la Tour, pages 113, 115:—

"The considerations on which the decision in Hochster *vs.* De la Tour, 2 E. & B., 678, is founded are that the announcement of the contracting party of his intention not to fulfill the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents, including

non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

"It is true, as is pointed out by the Lord Chief Baron in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster *vs.* De la Tour proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party and the announcement that it never will be fulfilled must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

"The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

"It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor and taking timely measures, the promisee may in many cases avert, or, at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

He further points out that a promise to marry creates a *status* or condition of betrothment, and this view was enforced by Mr. Justice Byles, in his concurring opinion,

who contended that the breaking off of a mutual engagement to marry amounted to a breach of contract by putting an end to the condition of betrothment, which, according to the contract, was to continue.

These cases might very well, therefore, be sustained upon their particular facts as exceptions to the general rule; but the assertion by the Chief Justice that "a party to the contract has the right to have it kept open as a subsisting and effective contract" (which is repeated by Miller, J., in Dugan *vs.* Anderson, 36 Md., 567) is unsustained by authority and entirely inconsistent with principle, and no case can be found in which any judge ever allowed damages to be assessed by way of compensation for the failure to keep the contract open as a subsisting and effective contract. A business man may look upon his outstanding contracts as an asset, but the only compensation he can recover, and the only right which the law will enforce, is for the pecuniary damages resulting from the breach, but for the loss of the shadowy, sentimental right to have a continuing recognition of the contract as such, the law gives no remedy. Even in the cases referred to, the measure of damage is still said to be the compensation for the refusal to perform at the time fixed by the contract, and no one has ever suggested that the measure of damages for an anticipatory breach differed, except in so far as in one case the jury would be obliged to guess, whereas in the case of an actual breach they would be able to base their verdict upon facts instead of conjecture. The illustration of Mr. Justice Wells in his opinion in Daniels *vs.* Newton, 114 Mass., 530, 532, of the case of commercial paper, is unanswerable. No renunciation of his obligation to meet his note would render the maker liable before the day fixed for payment, and, upon principle, it is impossible to distinguish between a promise to pay negotiable paper and the promise to pay for goods when and as delivered. The opinion of Mr. Justice Wells contains a thorough discussion of all of the authorities down to date, and he concludes by saying:—

"Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought

to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him his right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed."

* * * * * * * *

"That this is the natural and ordinary rule seems to be recognized by Lord Campbell when he declares that 'it cannot be laid down as a universal rule,' and proceeds to point out exceptions. And Lord Chief Justice Cockburn concedes it to be true 'that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived.' L. R., 7 Ex., 114. But a preceding 'inchoate right' is discovered, and a corresponding obligation implied, upon which there may be held to be a 'breach of the contract when the promisor repudiates it and declares he will no longer be bound by it.'"

* * * * * * * *

"These, however, are considerations which touch the interpretation and effect of the particular kind of contract; and, so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement, 'by reason of the future non-performance,' will be 'virtually involved,' 'as one of the consequences of the repudiation of the contract,' it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts having a future day for their performance include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfillment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where

the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase money; and its written provisions, by which alone their obligations are to be ascertained, allow them thirty days, at least, within which to fulfill their agreement. The plaintiff could require nothing of them until the expiration of that time; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect to that agreement of sale. This action, therefore, cannot be maintained."

Daniels *vs.* Newton, 114 Mass., 530-539.

In other cases, both in England and in this country, the judges have contented themselves with treating the two leading English cases as binding authorities, and there has been no serious consideration of the question upon principle and no critical discussion of the authorities. Extracts from the opinions are given in the foot note of all which go beyond the mere citation of the two leading English cases.*

* In Holloway *vs.* Griffith, 32 Iowa, 409—an action for an anticipatory breach of contract to marry—the court adhered to its earlier decision in 19 Iowa, 179, saying: "The rule we deem sound and just, and too well settled to be now called in question."

In Grau *vs.* McVicker, 8 Bissell, 13, 16, which was an action upon a contract of lease, Drummond, J., says:—

"The second objection, as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he could not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or, as it is called in the books, a *locus poenitentiae*. Some authorities declare that in law there is this *locus poenitentiae*, and that a party shall have a chance to recant, and say, 'I was wrong, but when the time comes I will perform my contract.' Undoubtedly, there are authorities which declare that there cannot be a breach of contract, strictly so-called, until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the con-

The learned Circuit Judge says that in his opinion the argument in Daniels *vs.* Newton is well and sufficiently answered by Judge Lowell in Dingley *vs.* Oler, 11 Fed. Rep., 372, but upon a careful examination of the opinion of Judge Lowell it will not be found to merit this high commendation. Alluding to the suggested case of the negotiable note, he admits that it would be difficult to apply the rule or to find any damages in a case of the extreme simplicity and singleness of that supposed, but he offers really no argument in support of his decision.

The illustration drawn from the case of negotiable paper is, however, a conclusive answer in all cases of ordinary commercial contracts. Take an executory contract to sell, where the buyer gives his notes in advance, payable, successively, at the dates of deliveries. Would it be contended that suit can be brought either on the notes or on the contract immediately upon a renunciation in advance of the obligation to take the goods and pay the notes? But if not, it is impossible to distinguish such a case on the one hand from the giving of a promissory note, without

trary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And the chief importance, perhaps, of this case is that it becomes necessary to determine, in the midst of the conflict of authority upon this subject, whether, in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874, and I have come to the conclusion that there may be such breach.

"I think that the principles decided in the case of *Hochster* vs. *De la Tour*, reported in the 20th English Law and Equity Reports, 57, are sound. * * * The unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September

more, or from an agreement to pay the price, without more, as usually expressed in an ordinary contract of sale.

When the promise is nothing but a promise to pay

---

as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case, and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make—whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary, it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup.

In Burtis *vs.* Thompson, 42 N. Y., 246, 250, Grover, J., said:—

"Any conduct by a party who has promised to marry another that will render the contract no longer obligatory upon that other, is a violation of the duty and obligation created by the contract, and may therefore be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act. Annoying and distressing the feelings of the plaintiff in this way, whether the defendant was in earnest or not, fully justified the plaintiff in treating the contract as broken by the defendant. The plaintiff's (defendant's?) counsel insists that if this is the law to be applied in the present case, it will follow that the maker of a note due at a future day will make himself liable to an action instantly by declaring to the holder that he will

money, it is plain to every lawyer that the announcement of an intention not to perform that promise can give no new rights to the promisee, because he has nothing to do

never pay it. This conclusion does not at all follow. *In the case of such a note, the holder is in no respect damnified until payment is withheld after it is due. Until this happens, no legal right of his has been violated by the maker.* Not so in the present case. The defendant in a legal sense had rendered it certain that the plaintiff had lost absolutely all benefit to be derived by her from the contract. He had wrongfully caused her all the distress of wounded feelings that a breach by him at the day would inflict, which is an essential consideration in estimating her damages. In Hochster *vs.* De la Tour (20 Eng. L. & Eq.), it was held that a party who had contracted with another to enter his service as a carrier (*sic*) on the first day of June thereafter, became liable to an action before that day by giving notice of his refusal to employ him according to the contract. While not fully prepared to concur in the judgment in this case without further consideration, yet the reasoning of the learned judge, when applied to the facts in the present case, clearly shows the correctness of the charge upon the point under consideration."

In Howard *vs.* Daly, 61 N. Y., 362, an action for breach of contract of service, Professor Dwight, acting as commissioner of appeal, reviews the English cases, and concludes that "the rule in Hochster *vs.* De la Tour is universal in its application to contracts to be performed at a future day," but adds, "I presume it would scarcely be extended to mere promises to pay money or other promises of that nature, where there are no mutual stipulations."

The question was incidentally involved in Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442-446, where the reasoning of Hare, J., is against the right to maintain the action in the present case, although he expresses the opinion that the rule of Frost *vs.* Knight will prevail in the United States. He says:—

"*It is no doubt true in general that a suit will not lie on the day on which default is made in the performance of a pecuniary obligation. The cause of action is not complete on a promissory note until the morning after the last day of grace, and the principle is the same in the case of a bond. This is not because a man who is injured cannot seek redress immediately by suit, but because non-performance is not an injury until the time for fulfillment has expired.* If a man removes or converts the goods of another, the latter may proceed at once in trover or replevin; and so when a vendor refuses to deliver the goods, notwithstanding a tender of the price. In like manner a man who should promise to pay a sum certain at noon on a given day, could not complain that a writ issued the next hour was premature. It follows that when a purchaser refuses absolutely to accept or pay, the vendor may proceed forthwith in debtor *assumpsit*."

but to receive payment—and Judge Lowell apparently concedes this—but it is entirely sufficient for the protection of the party receiving such a notice in every other case, to relieve him from the duty of performance on his part without creating a new contract by accelerating the day of performance and payment. What consideration does he give for the creation of new rights and the imposition of new liabilities, and upon what principle is it that it is left optional with him to retain the old contract or make a new one at his pleasure? The rule heretofore was that upon notice of repudiation he might rescind, in which case the mutual promise was a consideration, or at his election he might enforce; but to allow him to recover damages for the breach of the contract in advance of the time of performance, is to give him more than compensation, and to impose more than damages upon his adversary.

It should be further pointed out that the rule relieves the seller from all risk and cost. If nothing had occurred leading the defendant to decline to take the hops, the plaintiffs would have been bound, even if they had made forward contracts, to run the risk of performance on the part of their vendors. Dealing in a commodity of fluctuating value, there would have been constantly the risk in respect to solvency and the willingness to deliver. Assuming a contract running over many years, the obligation of a vendor in California or the Philippines would be of very uncertain value, and yet, according to the rule adopted by the learned judge, the seller may relieve himself from all risks of non-performance on the part of his vendors, without even going to the trouble of making a formal contract, and proving that he could have bought at the bottom of the market, and thereby establish a standard of value. This is to put the plaintiffs in a far better position than if the contract had been performed, and to reward them for having the contract broken; and this, too, in the face of the fact that they unquestionably would have the right, under the authorities, to refuse to acquiesce in the renunciation, and to hold the contract open until the time of performance.

It may also be observed that the adoption of the rule in cases like the present, gives to the plaintiff in actual practice much more than he is entitled to have. In fixing the contract price for forward deliveries, the vendor must always charge for the risks of the market, and the other risks of business, while the defendant had certain chances to the benefit of which he was lawfully entitled. The vendor ran the risk of not being able to buy the article he had contracted to deliver, or of loss in transportation, and of the ultimate solvency of the buyer, all of which risks entered into the price. All these chances are eliminated, and the defendant, instead of being called upon to pay the damages fairly resulting from his refusal to take each successive delivery, is required to make a lump payment in advance, covering the aggregate estimated losses. This is giving the vendor more than compensation, and depriving the purchaser of the chances to which he is entitled, of being relieved from an onerous and oppressive bargain, and of the protection of the long-established rule of law which limited the measure of damages he could be required to pay in case of his inability or unwillingness to accept performance. This limitation was an integral part of the contract, and may have been the essential consideration for entering into an agreement running over so long a term of years. He might well argue that if there should be, as there was, an abnormal decline, the market would subsequently rally, and the average would nearly be maintained, but he might never have consented to take the risk of having his responsibility fixed by a speculative price at a single date, though the times of deliveries were to extend over years. The contract was made in 1893, and some of the deliveries were not to be made till 1898. It might as well have been for deliveries over fifty years. As a rule, in every cycle of ten years, market prices go from one extreme to the other. If the vendor, in case of breach, can get another forward contract, that is very well for his protection, and there is no reason why he should not be allowed to do so, but it affords no warrant for depriving the buyer of the chances

of the market, and for fixing his loss by a purely artificial quotation in the speculative exchanges of the country, instead of the difference between the contract price and the actual market price at the time of each delivery. The full compensation of the vendor would be made complete if he were allowed to tender each parcel as it became due, and if he had been fortunate enough to provide himself in advance at low prices, so much greater would be his profit; but the buyer should be no more required to pay in advance the aggregate sum of all the differences than the aggregate sum of all the installments of purchase money. It is not like the case of a manufacturer who has been relieved from the duty of needlessly producing an article rejected before making, where he would be obliged to expend the entire cost with the certainty of having no customer to accept and pay, for in the case of a simple contract of sale, the vendor is put at no disadvantage by reason of the renunciation on the part of the buyer by being obliged to wait for his profit until it has become due and payable by the terms of the contract. In a proper case, notice of a refusal to accept may excuse failure to perform, as prevention is always an answer to the plea of the want of readiness to perform; but as the action for an anticipatory breach is avowedly intended to put the parties in the same condition as they would have been in upon a failure to perform at the maturity of the contract, there is no collateral reason, as in the case of a servant, or of the betrothed woman, to give this compensation before the aggrieved party is entitled to it by the terms of his contract.

SECOND.

OF THE MEASURE OF DAMAGES.

In discussing the measure of damages, Judge Kirkpatrick says:—

"In an action upon an ordinary contract for sale and present delivery, the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that

this is not a general, invariable rule is apparent from the fact that it cannot be made to serve as a measure of damages in a case like the one at bar, where there is need for an immediate ascertainment, though delivery, by the terms of the contract, was not to be made until after the rendition of the judgment. The rule was no doubt adopted because in cases where applicable, it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case, other means must be employed, the courts do not hesitate to adopt a different rule. Thus, in Huntley *vs.* The Pittsburg Bessemer Steel Company, 121 U. S., 264, where a contract was made for steel rails of a peculiar kind, which the plaintiffs were prevented from manufacturing and delivering by the misconduct of the defendant, the court held that 'the proper rule of damages was the difference between the cost per ton of making and delivery and the contract price."

"The basis of recovery was said to be the gain which the plaintiff would have had if permitted to complete the contract. The damages of the plaintiffs in this case should be assessed upon the same principle—that of the gain there was to him in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops delivered according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The objection on the part of the plaintiff (defendant) that he was entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made necessary an antecedent ascertainment of the damages, and is bound to accept the situations caused by his own wrongdoing. Anvil Mining Co. *vs.* Humble, 153 U. S., 540.

"The record shows at what price such subcontracts as above referred to were obtainable, and judgment was rendered in accordance therewith."

It has always been recognized that in an action for an anticipatory breach of contract it is extremely difficult to arrive at the true measure of damages. In the case of the servant, the jury must guess as to his chances of obtaining employment. In fact, in Hochster *vs.* De la Tour he had secured a new engagement before trial. In the case of the betrothed woman they would be obliged to guess as to her chances of getting married in the interval, but that would be no more difficult than in the ordinary case of an actual breach, when the chances of future marriage should always be taken into account.

But in the ordinary action for failure to take and pay for goods the measure of damages is the difference between the contract and market price, of which the best evidence is a public sale, or a sale in the regular course of trade at the full market rate, after notice. In such a case the goods must be shown to be of the quality contracted for, and the price obtained upon resale is, of course, a fair test of market vaule. The difference between what the plaintiff gets from the resale and the contract price is exactly and precisely the compensation to which he is entitled. The verdict puts him exactly where he would have been if the purchaser had taken and paid for the goods.

In Brown *vs.* Muller, L. R., 7 Ex., 319, the plaintiff bought iron, to be delivered in about equal proportions in September, October, and November. In August the defendant gave notice that he did not intend to deliver. In December the plaintiff began his action for non-delivery, and it was held that the proper measure of damage was the difference between the contract and market prices of one-third of five hundred tons on the 30th of September, the 31st of October, and the 30th of November respectively.

Chief Baron Kelly said:—

"It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or, at all events, when the first breach took place and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or, again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Sup-

pose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible."

Brown *vs.* Muller, L. R., 7 Ex., 319-322.

In Roper *vs.* Johnson, also (L. R., 8 C. P., 167), it was contended by the counsel for the defendant that the plaintiff should have gone into the market immediately upon the breach and obtained a similar contract. It will be observed that the action was by the buyer for refusal to deliver. In the course of the opinion of the court it is intimated that the defendant might have given evidence that another contract might have been obtained on better terms on the day of the notice of the refusal to accept, but that in the absence of such evidence the true measure of damage was the market price upon the day appointed for performance. The remarks of Mr. Justice Brett are so directly in point that they may be quoted at length:—

"This is an action brought upon a contract for the purchase and sale of marketable goods, whereby the defendant undertook to deliver them in certain quantities at certain specified times, and the action is brought for the non-performance of that contract. Now, in ordinary cases, the contract is to deliver the goods on a specified day, and there is no breach until that day has passed. In the case of marketable goods the rule as to damages for breach of the contract to deliver is the difference between the contract price and the market price on the day of breach. That is perfectly right when the day for performance and the day of breach are the same. Another form of contract is, as in Brown *vs.* Muller, Law Rep., 7 Ex., 319, to deliver goods in certain quantities on different days. The effect of the judgment in that case is that the contract being wholly unperformed, there is a breach—a partial breach—on each of the specified days; such breaches occurring on the same days as the days appointed for the performance of

the several portions of the contract. But the case of Hochster *vs.* De la Tour, 2 E. & B., 678, 22 L. J. (Q. B.), 455, introduced this qualification, that where one party, before the day for the performance of the contract has arrived, declares that he will not perform it, the other may treat that as a breach. That complication has arisen here; the contract being for the delivery of the goods on future specified days, the defendant has, before the time appointed for the last delivery, declared that he will not perform the contract, and the plaintiffs have elected to treat that as a breach and to bring their action.

"Now, to entitle a plaintiff to recover damages in an action upon a contract, he must show a breach and that he has sustained damage by reason of that breach. These are two quite distinct. All that Hochster *vs.* De la Tour, 2 E. & B., 678; 22 L. J. (Q. B.), 455, decided was this, that if before the day stipulated for performance, the defendant declares that he will not perform it, the plaintiff may treat that declaration as a breach of the contract and sue for it. Now comes the question whether in such a case as this there is to be a different rule as to proof of the amount of damage which the plaintiff has suffered. The general rule as to damages for the breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day. Now, although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of breach. It appears to me that what is laid down by Cockburn, C. J., in Frost *vs.* Knight, in the Exchequer Chamber Law Rep., 7 Ex., 111, involves the very distinction which I am trying to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages: ***and that when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach.*** Now, how does the Chief Justice deal with the matter? He deals first with the case of an action brought after the day for performance. He says: 'The promise, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but, in that case, he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining

to complete it.' He then treats of the other case: 'On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time,' that is, from non-performance of the contract at the time or times appointed for its performance. That clearly negatives Mr. Herschell's argument, and gives the rule for the assessment of damages in the way I have stated, viz., *that they must be such as the plaintiffs would have sustained at the day appointed for performance of the contract.* Then he goes on and shews the real distinction between the cases he has put. 'Subject, however, to abatement in respect to any circumstances which may have afforded him the means of mitigating his loss.' He says further: 'The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract: and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and, in assessing the damages for breach of performance, a jury will, of course, take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done whereby his loss has been or would have been diminished.' He uses the very term I used in the course of the argument, and which Mr. Herschell objected to, viz., 'ought to have done.' It seems to me to follow from that ruling that the plaintiffs here did all they were bound to do when they proved what was the difference between the contract price and the market price at the several days specified for the performance of the contract, and that *prima facie* that is the proper measure of damages; leaving it to the defendant to shew circumstances which would entitle him to a mitigation. No such circumstances appeared here; there was nothing to shew that the plaintiffs ought to have or could have gone into the market, a rising market, and obtained a similar contract. But I cannot help thinking that the Chief Justice's judgment in the case last referred to goes further, and says in effect that the plaintiffs were not bound to attempt to get a new contract. It was

upon precisely the same argument that the Chief Baron in Brown *vs.* Muller, Law Rep., 7 Ex., 319, decided against Mr. Herschell that the plaintiff there, as a reasonable man, was not bound to make a forward contract. Baron Martin held the same, though apparently with some reluctance; but no doubt is expressed in the judgment of Baron Channell. If we had been altogether without authority I should have come to the same conclusion. But I think we are bound by the authority of Frost *vs.* Knight, Law Rep., 7 Ex., 111, and Brown *vs.* Muller, Law Rep., 7 Ex., 319."

As already noted, the action in Roper *vs.* Johnson was by the buyer for refusal of the seller to deliver the coal he had agreed to furnish. What is said as to the possibility of the defendant mitigating the damages by offering evidence to prove that the plaintiff could have provided himself with other forward contracts is purely *obiter*, but rests on the familiar rule that the party aggrieved must reduce the damages so far as possible. The plaintiffs claimed that they needed the coal for consumption, and it was argued that it was their duty to supply themselves by taking contracts at lower prices, if able to do so, but it is difficult to see why they had not the right to take the risk of the market and to defer supplying themselves from month to month until the coal was actually needed. What was actually decided was, that if evidence could have been produced to prove that forward contracts could have been obtained, the burden rested upon the defendant to prove the fact, but it was not decided that if such evidence had been tendered it would have been competent, and in the opinion of Kelly, C. B., it would not have been.*

But the case of the buyer who needs goods for use and neglects to provide himself elsewhere, and to mitigate the damages, when the chance offers, is very different from the present, where the seller claims that he could have bought forward contracts in advance, and could have thus quali-

* In the case of L. S. & M. S. Ry. Co. *vs.* Richards, 152 Ills., 59, however, the question came up for decision, and it was *held* that the vendor, not being bound to accept the notice of renunciation, was not required to resell the grain on hand or make a forward contract, but might treat the contract as still in force.

fied himself to make the deliveries as they would have become due. This is for the purpose of aggravating, not of mitigating, the damages. According to the contract, the extent of the buyer's obligation was to take the goods as delivered, at the times and in the amounts stipulated, or to pay the difference between the contract price and what the seller could get for them from some one else upon a resale at the full market price. He is entitled to the benefit of the market at each due date, and *non constat* that the market might not advance so as to make the loss nominal. In fact, the price allowed for the crop of 1897 was two cents higher than for that of 1896, and the evidence showed that the lowest prices ruled in the Summer of 1896, after which time there had been a steady advance.

In his opinion the learned judge of the Court of Appeals does not meet, or even discuss, the objection that the plaintiffs were given their money before the date called for by the contract. It does not matter whether the defendant is a wrongdoer or not. The only damages which the plaintiffs could recover for the breach of their contract would be an amount sufficient to give them compensation, or, in other words, to put them in precisely the same position which they would have been in if the contract had been performed.

If the contract had been performed, they would not have received the purchase money until the time of payment according to the contract, and the final payment could not have been had until the tenth day of August, 1898. It is obvious, therefore, that assuming that the computation of damages was correct in all other respects, the plaintiffs were only entitled to insist on the payments which should have been made down to the date of judgment, and the defendant was entitled to a discount on all future payments down to August 10th, 1898, for the simple reason that the plaintiffs were not entitled to get their profits until the time of actual delivery. The contract price was twenty-two cents per pound, and the average damages allowed were twelve cents per pound, or twelve twenty-seconds or six-elevenths of the contract price, so that the

plaintiffs were awarded six-elevenths of the contract price as of October 24th, 1896, though the last installment was not due under the contract till August 10th, 1898. It is very apparent, also, that as at the time of the refusal to accept the first tender in October, 1896, the market was at the lowest point, and prices continued to advance down to August, 1898, the plaintiffs have been allowed to recover and the defendant compelled to pay a sum far beyond what would have compensated the plaintiffs for the actual breaches of the different contracts as they matured, and if, in addition, the defendant is required to make this payment months before the money was due according to the contract, the dangers and mischiefs of judge-made law will be manifest.

R. O. MOON,
R. C. DALE,
SAMUEL DICKSON,
For Plaintiff in Error.

APPENDIX.

After the foregoing brief had been printed, the attention of counsel was called to the case of Stanford *vs.* McGill, 6 North Dakota, 534. The opinion of Chief Justice Corliss contains so elaborate a discussion of the principles involved and so complete a review of the authorities, that it is believed that it will conduce to the convenience of the members of this court to have it appended in full:—

CORLISS, C. J. On the 3d of August, 1895, plaintiff and defendants entered into an executory contract for the sale by plaintiff to defendants of five thousand bushels of No. 1 flax, at one dollar a bushel, to be delivered at Kelso, in Traill County, in this State, during the month of September of that year. On the 7th of September following the defendants notified the plaintiff by letter that they did not recognize the binding force of the agreement, and therefore refused to carry it out on their part. This letter was received by him September 8th. At that time the plaintiff had not exercised his option to make delivery at any time during that month, as was his right under the contract. The action was to recover damages for breach of this agreement, and on the trial of the case the court directed a verdict for the plaintiff. The defendants on this appeal urge certain reasons why they should not be held liable. They insist that the crop of flax raised by plaintiff on his farm was mortgaged, and that therefore he could not give them an unincumbered title. But whether he could deliver the flax, according to his contract, free from all liens, could not be determined in advance of the actual delivery thereof. In the meantime the mortgage might be paid or the mortgagee might release the five thousand bushels from the lien of his mortgage. Had the plaintiff tendered the defendants five thousand bushels with a lien thereon, they would have been justified in refusing to receive the same; and had

he not, in proper time, delivered to them the flax free from all incumbrances, they could have held him responsible for breach of contract. But they had no right to settle for the plaintiff, in advance of the time when he was required by the terms of the contract to make delivery, the question whether he could and would deliver unincumbered flax. Moreover, the specific property to be delivered was not designated in the contract. It was not necessary that the plaintiff should deliver any of the flax raised upon his own farm. Delivery of any five thousand bushels of flax, of the quality and grade specified in the agreement would have constituted compliance with the contract on the part of the plaintiff. It is further urged that plaintiff was not able to deliver the flax, for the reason that up to the end of the month of September he had threshed only six hundred and forty-two bushels. If it should be conceded that plaintiff had not, and could not have, threshed a bushel during the month of September, this would not establish any inability on his part to comply with the terms of his agreement. A person may agree to sell property which he does not even own, and the purchaser cannot on that account insist, as an excuse for violating his agreement, that it is not in the power of the vendor to make good his promise. This fact cannot be ascertained until the day for delivery has come and passed without any delivery being made. It is claimed that plaintiff rescinded the contract by selling the five thousand bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfill their agreement. The question whether the contract was rescinded is so related to the question whether it was violated by the defendants, and the further question when it was broken by them, if at all, that it will conduce to clearness of discussion to treat these questions together.

On receiving from defendants their letter of the 7th of September, repudiating the contract, the plaintiff wrote them that he expected them to carry out the agreement, and that he would give them further time for considera-

tion. In this letter, which was written September 9th, he says, among other things: "Altogether, I am inclined to defer my conclusions until you have taken time to review the transaction, and see the unfavorable light your letter of the 7th puts you in. I certainly shall expect you to take flax as per agreement. Please let me hear from you again by return mail." On the same day he sold on the Board of Trade in Duluth five thousand bushels of flax, through brokers in that city. In his testimony he speaks of this flax as being the same flax which he had agreed to sell to defendants. He says: "When I received this letter (referring to the one dated September 7th), I sold the 5,000 bushels of flax in Duluth. I sold it to Wheeler, Carter & Co. On September 9th I telegraphed Wheeler, Carter & Co. of Duluth, relative to the sale of this 5,000 bushels of flax, as follows: 'Sell five October flax. Answer.'" Wheeler, Carter & Co. answered by wire that they had sold the flax; and the same day they confirmed their telegram by a letter, in which they explained in detail the circumstances and terms of the sale. But it is undisputed that the title to the flax sold in Duluth did not pass to the vendees in such sale, nor was possession thereof delivered at any time during the month of September. The contract was merely an executory contract for the sale of five thousand bushels of flax, to be delivered in October. On the 11th of September the plaintiff, not having received from the defendants any answer to his letter of the 9th, again wrote them; and on the 13th they sent him a reply, in which they reiterated their purpose to treat the alleged contract as possessing no binding force. In this letter they said: "We expressly deny that any contract exists which obligates you to deliver to us, or we to receive from you, flax, at any time, or at any price." This closed the correspondence between the parties. The plaintiff did not thereafter inform the defendants that he elected to treat their second refusal to recognize the contract as a breach thereof; nor did he advise them, after their last refusal, that he had decided to exercise his option to insist upon the fulfill-

ment of the agreement before September 30th. The contract gave him the option to call for performance at any time during the month of September. This action was not commenced until after the 30th of that month.

We will first consider the case as though there was a fixed time for performance of the agreement, and that that time was September 30th. Under the English doctrine, which has apparently met with much favor in this country, the plaintiff, even assuming that the day for delivery of the flax was September 30th, and that he had no right to call for an earlier performance of the agreement, might have elected to treat the defendants' premature refusal to carry out the contract as an immediate breach thereof. *Hochster* vs. *De La Tour*, 2 El. & Bl., 678. But he did not so elect. On the contrary, he wrote the defendants that he would give them time to reflect and then determine what they would do, but that in any event, no matter what their decision might be, he would hold them to the contract. His words were: "I shall expect you to take flax as per agreement." Although the English courts have, in our judgment, departed from sound principles in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfill it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. In England the innocent party may treat a premature refusal to perform as a present breach, but he is not bound to do so. If he elects to ignore such refusal, the agreement, so far as the question of the violation of it is concerned, stands precisely the same as though no word had been uttered by the other party. If anything occurs which would have released that party from the obligation of the agreement

had he remained silent, he is released notwithstanding his premature repudiation thereof. It follows, too, that if then the then innocent party thereafter violates the contract the other party may take advantage of such violation of the agreement, just as he could have taken advantage of it had he not himself prematurely refused to respect the binding force of such agreement. All the adjudications which follow what may, for convenience, be denominated the "English doctrine," indorse this qualification of that doctrine, and it is repeatedly recognized by the English tribunals themselves. *Frost* vs. *Knight*, L. R., 7 Exch., 111; *Roebling Sons' Co.* vs. *Lock-Stitch Fence Co.*, 130 Ill., 660, 22 N. E. Rep., 518; *Kadish* vs. *Young*, 108 Ill., 170; Lawson Cont., section 440; *Zuch* vs. *McClure*, 98 Pa. St., 541; *Avery* vs. *Bowden*, 5 El. & & Bl., 714; *Reid* vs. *Hoskins*, *Id.*, 729. In *Frost* vs. *Knight*, Lord Chief Justice Cockburn said: "The law with reference to a contract to be performed at a future time, where the party bound to perform announces, prior to the time, his intention not to perform it, as established by the cases of *Hochster* vs. *De La Tour* and *Harbour Co.* vs. *Xenos* (13 C. B. (N. S.), 825), on the one side, and *Avery* vs. *Bowden*, *Reid* vs. *Hoskins*, and *Barnick* vs. *Bulba* on the other side, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative and wait the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance. But in that case, he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any circumstances which would justify him in declining to complete it." We are, therefore, clear that if plaintiff's letter of September 9th is to control, the contract was not broken September 7th. The plaintiff, in and by that letter, elected to treat the contract as unaffected by the letter of September 7th, written him by the defendants.

But it may be urged that other circumstances show that the plaintiff had elected on September 9th to treat the contract as broken by the defendants by their first letter dated September 7th. In his complaint the plaintiff alleges that he made the sale of the five thousand bushels of flax in Duluth for the purpose of fixing at that time the amount of defendants' liability for damages, the price of the flax being at that time daily on the decline. The averment of the pleading on this point is as follows: "That immediately after the defendants had so repudiated the said agreement and refused to accept the delivery of the said flax and refused to pay for the same, as provided by and in the said agreement, and on or about the seventh day of September, A. D. 1895, the plaintiff, in order to protect the defendants against loss as much as possible, in view of the facts and circumstances incident to the said agreement and the said breach thereof, the market price of flax being then daily on the decline, sold the said five thousand bushels of flax at the best market price obtainable, and which he could obtain for the same." Taking plaintiff's allegation in connection with this testimony, there is much to show that he had elected to proceed on the theory of a breach of the contract on September 7th, the day when the defendants wrote their first repudiation of the agreement. But the sale of the five thousand bushels of flax in Duluth on September 9th does not purport to be a sale of the particular flax which plaintiff had contracted to sell the defendants, nor is there anything to indicate that plaintiff's purpose in selling it was to fix the defendants' damages, on the theory of a then breach of the contract, aside from his allegation in the complaint. He never at any time disclosed to the defendants any such purpose, nor did he ever advise them at all that he had sold their flax. On the contrary, he distinctly informed them in his letter of September 9th that he did not consider their letter of September 7th as a breach of the agreement, but that he certainly would expect them to take the flax according to the contract. His election to ignore their premature refusal, and to

treat the agreement as unaffected by anything they had said, is conclusively shown by his letter of September 9th; and thereafter the defendants might have recalled their refusal and have proceeded with the performance of the agreement, despite anything the plaintiff might in the meantime have done. His undisclosed sale of the flax in Duluth could in no manner affect their right to hold him to his avowed purpose to regard the agreement as continuing in unimpaired force. Moreover, we should reach no different conclusions, even if we should find that plaintiff had not in express terms asserted that he would not treat the contract as broken. We are confident in the soundness of our view that the English doctrine that a refusal to perform a contract before the period of performance by either party has arrived, constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results. This point, however, we will discuss in a later portion of the opinion.

But it is strenuously urged that plaintiff cannot recover because he has rescinded the contract, and also because he had himself broken it, while it remained unbroken by the defendants. The sale in Duluth is relied upon as establishing the recision by him of the agreement. We are concerned in this case with only the question of recision based on mutual consent. It is not a case where one party has the right to rescind an agreement for the fraud of the other, or for other legal reasons of like character. When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may treat such conduct as an

overture for recision, and assent thereto. Doubtless, the plaintiff, after receiving from the defendants their letter of September 7th, might have written them that he considered the contract as canceled, and thereafter it would have been forever extinguished for all purposes. Possibly he might have rescinded without performing any overt act, or making any statement to manifest his purpose. But that he never intended to rescind the agreement is too clear to admit of doubt. His letter of September 9th shows that he had no thought of rescinding, and thereby releasing defendants from liability. So do the allegations of his complaint. Although his letter is inconsistent with the averments of his pleading that he sold the flax on a theory of a present breach of the contract, yet it is to be noticed that nowhere does he assent to a recision thereof. His attitude is at all times that he will rigidly hold the defendants to the obligations of their agreement. In his letter he tells them that he will hold them to it, by this statement that he will insist on performance on their part. In his pleading he alleges that he intended to hold them to it when he sold the flax in Duluth, for he sold it with the express purpose of fixing their damages for a breach thereof. However much he may have been mistaken as to his legal right to sell at that time and in the manner in which the sale was made, for the purpose of fixing the measure of damages, he clearly never meant to acquiesce in the repudiation of the contract by the defendants, and thus assent to a recision thereof. But if, while the agreement remained in full force the plaintiff himself violated its terms, then it is obvious that the defendants may take advantage of this breach as a perfect defense. They may elect to treat his breach of contract as warranting a recision thereof by them, or they may consider it as a breach rendering him liable for damages. In either event they would have a perfect defense to this action. It is therefore necessary to determine whether by the sale of the flax in Duluth on the 9th of September, the plaintiff himself violated his agreement to deliver the flax to the defend-

ants. It is not pretended that he violated it in any other manner. The plaintiff did not agree to deliver any particular five thousand bushels of flax to the defendants. All that he was called upon to do, to fulfill his obligation, was to deliver the specified number of bushels of flax, of the quality and grade designated in the contract, without reference to the place where it was raised or the question whether it was owned by the plaintiff at the time the agreement was entered into. But it is said that it appears from the plaintiff's testimony that he segregated five thousand bushels of flax from the common mass of the flax raised by him on his farm, and then sold that particular flax in Duluth, as being the identical property he had agreed to sell the defendants. It is true that he speaks of selling the same flax that he had agreed to deliver to the defendants, and the allegations of his complaint are to the same effect. But it is evident that the segregation of this flax was purely mental. He did not in fact set apart any particular five thousand bushels as the property he had obligated himself to deliver to the defendants, and then agree to sell the same property in Duluth. At that time none of his flax had even been threshed. But even if we should assume that plaintiff had actually set apart a particular five thousand bushels, as the flax he was subsequently to deliver, and that thereafter he had sold and delivered it to a third person, this would not of itself constitute a breach of his contract. The selection by the vendor of the property he intends ultimately to deliver under a contract is not irrevocable, where he has the choice, and the vendee does not unite with him in such selection. Despite the fact that the vendor has set apart the property as the particular property he will finally deliver, he may change his mind before the time for delivery arrives, and substitute other property in place of that which he had tentatively selected. The vendee acquires by such an *ex parte* selection no vested right to insist that that is the particular property which must be delivered to him by the vendor to fulfill the conditions of the contract. All he can de-

mand is that, when the time for performance arrives, property of the description and quality specified in the agreement shall be delivered to him. The implied understanding of the parties is that the vendor shall have until the day for performance to determine what specific property he will deliver. Any selection made by him before that time is revocable by him. The rights of the vendee are in no manner affected by such selection or by the vendor's change of mind. He has no cause for complaint, provided, at the time prescribed in the agreement, property of the kind and quality of the property therein specified is delivered to him in strict accordance with the provisions thereof, whatever vacillations of purpose may have characterized the conduct of the vendor in the meantime. Should a grocer, receiving from a customer an order for a barrel of flour of a particular brand, to be delivered the following day, select, in the absence of such customer, a barrel from a number of barrels in stock, and direct that that barrel be taken to the customer's house the next day, it certainly would not be a breach of the contract for him subsequently to sell it and substitute another barrel in its place; the sale and substitution both taking place before the time for delivery according to the agreement had arrived. Indeed, it is questionable whether a sale and delivery of property by the vendor before the day for delivery under an executory contract has been reached is a breach of such contract, even in cases where the specific thing to which the contract relates is agreed upon by the parties. If A. agrees to sell and deliver to B. at the end of thirty days a particular horse, for a price named in the contract, can it be said that A. has put it out of his power to perform the agreement by selling and delivering to C. the same animal twenty days before B. can call for the performance of the contract by A.? How can B. say, without possibility of error, that A. will not be able to perform his agreement when the time for performance arrives? May not A. repurchase the horse in time to fulfill his compact with B.? See opinion of Denman, C. J., in *Lovelock* vs.

Franklyn, 8 Q. B., 371; 2 Pars. Cont., 666, 667. But see *Heard* vs. *Bowers*, 23 Pick., 460. Besides, on what principle can be based the doctrine that the certainty that a party will not be able to perform his agreement when performance by him is due, is equivalent to a present breach of the contract, although, as a matter of fact, he has not violated, and cannot violate, the contract until the future day for fulfillment has been reached? It is by no means certain that the fact that a party has put it out of his power to perform a contract when the day of performance has arrived is a breach thereof, or whether the utmost effect of such an act is merely to make inevitable a future breach of the agreement. Neither can it be said in every case that the bare fact that the vendor in an executory contract of sale has, before performance is due, sold the very property to which the executory contract relates, demonstrates the certain inability of the vendor thereafter to make delivery in the future in accordance with the terms of his promise.

But in the case at bar it does not even appear that the plaintiff had sold the flax he had agreed to sell to the defendants. The second contract, like the first, was executory. It was an agreement which by its very terms was not to be performed until after the time for performance of the contract with the defendants had passed. The Duluth contract provided for delivery in October. It is therefore clear that plaintiff had not divested himself of the title to the flax, or agreed to deliver possession thereof to the Duluth parties at any time prior to the time for delivery to defendants under his contract with them. And it is an undisputed fact that he did not deliver any such flax to the Duluth parties until long after the day for delivery to the defendants had passed. Indeed, all the flax called for by the Duluth contract had not been delivered at the time this case was tried. It is therefore apparent that, during the entire period between the making of the contract with the defendants and the time for performance thereof, according to its terms the plaintiff had not parted with the title to or possession of the five thousand bushels of flax, even assuming that

the contract with defendants related to a particular five thousand bushels. Conceding that the two contracts both related to the same property, yet it is obvious that it cannot be said that the mere fact that plaintiff could not fulfill his agreement with defendants without being guilty of a breach of contract with the Duluth parties establishes the proposition that he had placed it beyond his power to carry out his agreement with the defendants. He was absolutely master of the situation. He could break either contract he saw fit to break, and perform either contract he saw fit to perform—subject, of course, to legal liability for such breach. But it was not even necessary for him to violate his agreement with the defendants in order to fulfill his contract with the Duluth parties, even asuming that he had agreed to sell a particular five thousand bushels to the defendants, and had in mind the same flax when he made the Duluth contract. In that contract he did not bind himself to deliver any particular five thousand bushels of flax, but on the contrary, to deliver any five thousand bushels of a certain grade, which he might tender in fulfillment of the contract. He may have considered that he was selling the five thousand bushels he had agreed to sell the defendants, and yet he did not bind himself to sell only this flax to the parties in Duluth. At no time, therefore, did he divest himself of the title to the particular flax he had agreed to sell to defendants, assuming the specific flax to have been pointed out, or the possession thereof, or bind himself to sell it at all to the parties in Duluth.

When plaintiff wrote to defendants, on September 9th, stating that he would give them further time to consider their refusal to recognize the contract, his attitude was that he did not elect to treat their first letter, to which his letter was in answer, as constituting a breach of the contract. But he did not thereby bind himself not to consider any subsequent repudiation by them of the agreement as a violation thereof. Accordingly we would be compelled to hold that, on the receipt of their second letter, plaintiff was in a position to insist that defendants had broken the contract, if we should adopt the English rule. As before indicated, we

deem it indefensible on principle, nor are we able to discover how it subserves business convenience, or in what respect it is more just than the contrary doctrine. In the country in which it had its origin, it was not at first recognized as the correct rule of law. In *Phillpotts* vs. *Evans*, 5 Mess. & W., 475, Parke B., said: "The notice that he will not receive the wheat amounts to nothing, until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract." "I think no action would have then lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendants would then receive it." In *Lehigh* vs. *Paterson*, 8 Taunt., 540, the defendant had until December 31st in which to deliver the goods contracted for. On October 1st, he notified plaintiff that he would not carry out his contract. The question was whether the market value of the goods on October 1st or December 31st should be taken into consideration in fixing the plaintiff's damages. The court ruled that the value on December 31st was the value to be ascertained in determining the damages, and the decision was placed on the ground that, despite the premature repudiation of the contract by the defendant, he might thereafter have delivered the property at any time up to December 31st. Dallas, C. J., said: "The defendant had a right to deliver the tallow at any time before 12 o'clock at night on the 31st of December." Parke, J., said: "The defendant might have delivered the tallow at any moment up to the 31st of December, and the price on that day should have regulated the verdict of the jury." In *Ripley* vs. *McClure*, 4 Exc., 359, the court said, in reference to the contention of counsel for defendants, that the refusal on the part of the defendants to accept the goods, the refusal being made before the time for performance had arrived, was no more than an expression of intention, which could be retracted: "And we think that, if the jury had been told that a refusal before the arrival of the cars was a breach, that would have been incorrect. We consider that point rightly decided in *Phillpotts* vs. *Evans*, 5 Mess. & W., 475." Mr.

Benjamin, in his work on Sales, declares that "the date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and to refuse accepting the goods." Volume II., section 1118. In the very case in which the modern English doctrine was first promulgated (*Hochster vs. De La Tour*, 2 El. & Bl., 678), Lord Campbell clearly recognizes the general rule that until the time for performance has arrived there can be no breach, by the assertion that it is not the universal rule, and by proceeding to point out the exceptions to it. He seems to have treated the case before him as an exception to the general rule. And in *Frost* vs. *Knight*, L. R., 7 Exc., 111, 114, Lord Chief Justice Cockburn declares, in so many words, "that there can be no actual breach of the contract by reason of non-performance so long as the time for performance has not yet arrived." In *Roper* vs. *Johnson*, L. R., 8 C. P., 167, the doctrine laid down in *Hochster* vs. *De La Tour* is spoken of as a novel doctrine. While the court in *Frost* vs. *Knight*, L. R. 7, Exch., 111, treats the rule enunciated in *Hochster* vs. *De La Tour*, as settled law, yet when *Frost* vs. *Knight* was before the court of exchequer the majority of that court (Kelly, C. B., and Channall, B.) vigorously assailed the anomalous doctrine which was applied in the Hochster case. See L. R., 5 Exch., 322. It is so obvious that, unless some obligation is violated by a party, he cannot be said to have broken his contract, that Lord Chief Justice Cockburn in *Frost* vs. *Knight*, was obliged to assume, in order to support his reasoning in that case, that there was an implied understanding that neither party should sever the contractual relation, and that the premature refusal to perform was a violation of this implied understanding. The Lord Chief Justice says: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may

be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must, of course deprive him. It is therefore quite right to hold that such announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly." But that is a strange mode of reasoning which assumes a breach for the purpose of establishing a breach. Lord Cockburn asserted that the contractual tie was severed, for the purpose of proving that the contract had been violated. Unless the contract calls for a continuance of the willingness of a party to perform it during all the time between the execution thereof, and the day of performance, his mere expression of a purpose not to fulfill its obligation is not a breach of such contract. But what interest has a vendor in a contract for the sale of property in the unchanged purpose of the vendee to carry out the agreement? The only matter which concerns him is the willingness of the vendee at the time specified in the contract to accept and pay for the property. There is always the possibility that either party to an agreement may violate it when performance by him is due. This possibility is not converted into a certainty by his premature refusal to fulfill its obligations. He may repent his hasty decision. After such an anticipatory disavowal of the contract there still remains, as before, the possibility both of ultimate performance and of ultimate violation of the agreement by the one who has threatened, but only threatened, to ignore it. By a premature repudiation the rights of the other party are not in any degree affected. He still has a right to insist upon the performance of the agreement at the appointed time, or that the other party shall pay damages for the breach of the contract. This was the extent of his right before the other party had spoken a word inimical to the agreement, and he continues to enjoy this right despite such premature repudiation.

How it can be asserted, as Lord Chief Justice Cockburn asserted in *Frost* vs. *Knight*, that the premature re-

pudiation of a contract deprives the other party of all advantage under it, is inexplicable. He, in the very same opinion, declared that the innocent party, so far from being deprived of any advantage, could elect to treat the agreement as unimpaired. The warning, which leaves the agreement unaffected, is a positive benefit, and not a detriment to the other party. Should the would-be violator of the agreement keep his purpose to himself, the other party would be in a situation not so favorable. Suppose, for instance, that the vendor had agreed to sell property, fluctuating in value, at a specified time. He may discover subsequently to the making of such contract that the vendee has become insolvent and does not intend to perform the agreement; yet so long as such vendee keeps silent the vendor is obliged to stand to the agreement, taking all the risk that, if the market should turn against him at the time for delivery, he must lose, and yet knowing that, if the market should prove favorable to him, the vendee will break the contract, and leave him (the vendor) only a worthless cause of action for damages against a bankrupt. Under such circumstances a statement by the vendee that he will not carry out the contract would place the vendor in a more favorable position, for it would enable him, at his option, to rescind the contract, thus escaping the risk of loss, in a case where he could not hope to reap any benefit from the agreement should the market be favorable to him at the time for performance. The fundamental inquiry is, of course, in every case, whether any essential provision of the contract, either express or implied, has been violated. If the agreement is for the sale of property at a fixed time in the future, the intermediate expression by either party of a purpose not to stand by the contract is not a breach thereof, because he has not thereby done anything in violation of his promise, to the detriment of the other party. But, if the contract is to marry at a future date, a different case is presented. The agreement to marry connotes the further agreement to remain affianced until the performance of the contract has estab-

lished the still closer relation of husband and wife. Such an agreement establishes a distinctive relation, known as "betrothment." He who destroys this relation—though it be done before the period of marriage has, under the terms of the contract, arrived—violates the contract in a vital element; and the violation is none the less actionable because the promise to remain engaged in the meantime is implied, and not expressed. The contract is an entirety, and, when broken, is broken in its entirety. It is on this ground that the decision in *Frost* vs. *Knight*, L. R., 7 Exch., 111, 114, is placed by the Lord Chief Justice. He says: "It is next to be observed that the law, as settled by *Hochster* vs. *De La Tour* and *Harbor Co.* vs. *Xenos*, is obviously quite as applicable to a contract in which personal *status* or personal rights are involved as the one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise, with reference to domestic relations, and possibly pecuniary advantages, as also to the social *status* accruing on marriage, but a new *status*—that of betrothment—at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attach to it by the canon law and the law of any other country. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other. Neither can, consistently with such relation, enter into a similar engagement with another person. Each has an implied right to have this relation continued until the contract is finally accomplished by marriage." And Byles, J., concurs in the judgment of the court on the ground that the implied agreement to remain betrothed until marriage had been violated. He says: "An express precontract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or

status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So, I conceive, the man cannot, during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the meantime. So for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract; for it puts an end to the condition of betrothment, which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract."

A review of the English decisions will disclose the fact that only in a single case has this modern English doctrine been applied where the enforcement of a contrary rule would have led to a different decision. This is *Hochster* vs. *De La Tour* (decided in 1853), 2 El. & Bl., 678. In that case it appeared that the plaintiff and defendant, in April, 1852, had entered into a contract of service. The plaintiff was to serve the defendant as a courier in his travels on the continent, for a period of three months, commencing June 1st, 1852. On the eleventh day of May, 1852, defendant notified plaintiff that he would not perform the agreement, and on the 22d of the same year the action to recover damages for breach of the contract was commenced. The question was squarely raised, by the contention of counsel for the defense, whether what had been said by the defendant constituted a present breach of the agreement. The Court of Queen's Bench held that it did. Lord Campbell says: "The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it until the day when the actual employment as courier in the service of the defendant was

to begin, and that there could be no breach of the agreement before that day, to give a right of action. But it cannot be laid down as a universal rule that where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement until the day for the doing of the act has arrived." If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable for an action for breach of promise of marriage. *Short* vs. *Stone*, 8 Q. B., 358. If a man contracts to execute a lease on and from a future day, for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford* vs. *Tiley*, 6 Barn. & C., 325. So, if a man contracts to sell and deliver specific goods on a future day and before the day he sells and delivers them to another, he is immediately liable to an action, at the suit of the person with whom he contracted first to sell and deliver them. *Bowdell* vs. *Parsons*, 10 East, 359. One reason alleged in support of such an action is that the defendant has, before the day, rendered it impossible for him to perform the contract at the day. But this does not necessarily follow, for prior to the day fixed for doing the act the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods, so as to be in a situation to sell and deliver them to plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveler and courier, from the day of the hiring until the day when the employment was begun they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounced the engagement." "The man who wrong-

fully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait until the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer." So far as Lord Chief Justice could perceive, an analogy between the engagement between the plaintiff and defendant in that case and an engagement between a man and a woman who are betrothed, his faculty for discovering similitudes is certainly phenomenal. The balance of his reasoning is that the rule that is there laid down is more convenient than the other rule, which squares with legal principle. There is a tacit confession through this entire discussion of the question that the decision is at war with settled principle. And in *Frost* vs. *Knight* also, the argument of convenience appears to have had a great weight with Lord Chief Justice Cockburn. In *Dugan* vs. *Anderson*, 36 Md., 567, the court, while not deciding the question, seems to have been governed in the utterance of its *dictum* on the subject by considerations of convenience. We agree with the Massachusetts Supreme Court that the argument of convenience should have no weight as against the demands of legal principle. In *Daniels* vs. *Newton*, 114 Mass., 530, the court said: "Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before the argument can properly have weight, the point to be reached must be first shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some principle, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of, or prevented from acquiring, that which he is entitled to have

or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury, and not anticipated injury, is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or complying with performance on his part at a time when, and in the manner in which, he is entitled to perform it, or have it performed." And in *Frost* vs. *Knight*, L. R., 7 Exch., 111, Lord Cockburn declared that the argument founded on convenience should not control, but should be considered only in connection with arguments founded on settled doctrines of the law. He, however, was able to discover, as we have already pointed out, a basis for the English rule in elementary principles; but we are unable to agree with him in this respect, and such being the case, we have his authority for rejecting the argument of convenience when it stands alone as the supporter of this novel rule. Moreover, we are unable to see wherein business convenience is subserved by the English doctrine. It is subserved thereby only on the theory that to establish a rule for the special advantage of the party who does not proclaim his purpose to violate the contract is to advance the convenience of the business world. The option, under such doctrine, is with such party to treat the premature declaration as a breach of the agreement, or to refuse to so treat it. He may decline to consider it a breach and hold the other party to the contract, the same as though no word inimical thereto had been spoken. Under the guise of furthering business interests, the English rule unfairly discriminates against the party who speaks and in favor of the one who is silent. The latter may secretly intend not to carry out the agreement. The former may be actuated—indeed, he often is prompted—by the laudable motive of giving the other party timely warning of what he deems at the time his inevitable inability to perform the agreement. On what

principle of justice, then, should the law thus discriminate between the parties? If this rule be adopted, then it will not infrequently happen that a party has been held liable for a breach for merely admonishing the other party that a breach is inevitable, when, had he remained silent, no liability could have been enforced against him, because the contract would have been extinguished before the day for performance could arrive, by reason of the death of one of the parties thereto—the contract being for personal services—or because of the destruction before that day, without the fault of any one, of the subject matter of the agreement. By being allowed to treat the agreement as broken, the party can enforce a liability for substantial, and perhaps very heavy, damages; whereas if he had been forced to wait until it should be ascertained whether the other party would in fact perform his agreement, the damages then would have been merely nominal, or the latter might have escaped all liability, by reason of the extinguishment of the contract before the day of performance arrived, for the reasons already mentioned. Indeed, the party who sues might himself have been unable to perform when the time for performance was reached, and might have been put in default by demand of the other party that the agreement be carried out. If the doctrine of the Hochster case be sound, then one who has agreed to enter the service of another two years in the future may elect to treat as a breach of the contract an immediate refusal by the employer to fulfill the same, and he may then sue, and the case may be tried before the period for entering upon the discharge of his duties under the contract has arrived. In such a case he would recover full wages; it being impossible to show what he had earned or could have earned during the time he was to have worked for the defendant. And yet subsequent developments may reveal the fact that, so far from being damaged, he was positively benefited, by the fact that he did not enter the defendant's employ. He may during that period earn double the wages he was to have received under the contract, and this, too, in

addition to that which he has already collected without doing a stroke of work therefor. Nay, the death of the employer before the day for commencing the performance of the agreement arrives, working an extinguishment thereof, may show that but for his statement the plaintiff could never have collected a dollar. Undoubtedly, the party to whom the refusal is communicated may treat it as an overture for a consent by him to recision, and rescind the contract. But he has no right to construe as a present breach words which only disclose the probability of a future breach. Many of the cases which appear to support the doctrine of the Hochster case are distinguishable on this ground of recision. It will be found on an analysis of them that all that the party to the contract was seeking to do by his action was to recover on a *quantum meruit*, on the theory that he had rescinded the contract on being informed by the other party that he did not intend to carry it out. The court did not in these cases hold that the contract was broken, but merely that, it having been rescinded by mutual consent, the party who had parted with anything of value in the performance of the agreement could recover the value thereof, on an implied promise to pay the same. In *Planche* vs. *Colburn*, 8 Bing., 14, the plaintiff had a contract with the publishers of a periodical, to write a series of articles therefor. The publishers having discontinued the publication, he treated their conduct as justifying a recision, and rescinded the contract. The action was to recover the value of work already performed by him, at defendants' request, in writing a portion of the articles. It was on this theory that a recovery was sustained. In some of the cases, the party to whom the notice of refusal was given had the option to call for a performance at any time; and, of course, he could elect to regard the time of performance as having arrived, and then treat the refusal as a waiver of tender of performance, and in this way hold the party as for a present breach of the agreement. This element existed in the following cases: *Lovelock* vs. *Franklyn*, 8 Q. B., 371; *Bowdell* vs. *Parsons*,

10 East, 359; *Newcomb* vs. *Brackett*, 16 Mass., 161; *Windmuller* vs. *Pope*, 107 N. Y., 674, 14 N. E. Rep., 436; *Short* vs. *Stone*, 8 Q. B., 358. Of the English cases, we have seen that *Phillpotts* vs. *Evans*, 5 Mess. & W., 475; *Ripley* vs. *McClure*, 4 Exch., 345; and *Leigh* vs. *Paterson*, 8 Taunt., 540; are opposed to the Hochster case. Mr. Benjamin also, in his work on Sales (an English work), states the rule the other way, as we have already seen. 2 Benj., Sales, section 1118. In *Lovelock* vs. *Franklyn*, 8 Q. B., 371, Lord Denham intimated that where the time for performance is fixed, the fact that a party has in the meantime incapacitated himself from performing the contract will not constitute a breach thereof. *Frost* vs. *Knight*, L. R., 7 Exch., 111, was an action for breach of promise to marry, and stands, as we have seen, on peculiar ground, not applicable to actions for breach of contract generally. And in the Court of Exchequer the doctrine in the Hochster case was powerfully assailed by the majority of the court. L. R., 5 Exch., 322. *Short* vs. *Stone*, 8 Q. B., 358, was also such an action. In this case the defendant had not only broken the engagement, but had actually married another person. *Planche* vs. *Colburn*, 8 Bing., 14, was not an action for breach of contract, but to recover on the theory of a recision. In *Harbour Co.* vs. *Xenos*, 13 C. B. (N. S.), 825, the action was not brought until after the time for performance had arrived. The defendant never retracted his premature refusal. Therefore, all the court was called upon to decide in that case was that when the day for fulfillment of the agreement was reached the unwithdrawn refusal was a waiver of tender of performance by the plaintiff, and enabled it to sue for breach of contract, the same as though such tender had been made and refused. There was no occasion for alluding in this case to the doctrine laid down in the Hochster case. In *Avery* vs. *Bowden*, 5 El. & Bl., 714, and *Reid* vs. *Hoskins*, *Id.*, 729, the court held that the plaintiff could not recover, because he had declined to treat the premature refusal of the other party as a breach. The same result was reached in these cases

that would have been reached if the doctrine we believe to be sound had been applied. In *Roper* vs. *Johnson*, L. R., 8 C. P., 167; and *Brown* vs. *Muller*, L. R., 7 Exch., 319, we observe the practical working of the rule promulgated by the Hochster case. Having violated legal principles once, in deciding that case, the courts were forced to violate them a second time, in laying down the rule relating to the measure of damages in such cases. Instead of fixing the value at the time of the premature breach as the element to be considered, the court held that the value at the time for performance, as fixed by the agreement, must be considered. In *Roper* vs. *Johnson* the court, after speaking of the doctrine of the Hochster case as a novel doctrine, says: "The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster* vs. *De La Tour*, the first case which decided that in the case of an executory contract the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach and suing for damages. That case has been distinctly recognized on subsequent occasions, and we must now assume it to be the law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases." Judge Keating, after referring to the rule the court would adopt in that case as to the proper measure of damages, said: "I think it is the better and the safer rule, though I am free to confess that the matter is by no means divested of difficulty—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster* vs. *De La Tour*." It must be admitted that the case of *Ford* vs. *Tiley*, 6 Barn. & C., 325, strongly supports the decision in the Hochster case.

In this country there appears, from a superficial view of the decisions, to be a great mass of authority in favor of the English doctrine. But a review of adjudication on this side of the water will reveal the fact that there is very little in the way of express authority in America upholding the English rule. The case of *Burtis* vs. *Thompson*, 42 N. Y., 246, may be dismissed with the observation that it was an

action for breach of promise to marry. In *Howard* vs. *Daly*, 61 N. Y., 362, there is a dictum by Commissioner Dwight that the doctrine in the Hochster case is sound. But the facts did not call for any decision on this point, as the defendant had refused to allow the plaintiff to enter upon the performance of her contract of service after the time for performance had arrived. The other members of the court expressly refused to state their views whether the English rule could be sustained in principle. (See page 378.) In *Bunge* vs. *Koop*, 48 N. Y., 225, all the court decided was that a premature refusal, unretracted, constitutes a waiver of tender of performance, when the time to fulfill the contract arrives, and that thereafter the plaintiff may sue for breach without showing an offer to perform. In *Freer* vs. *Denton*, 61 N. Y., 496, and *Shaw* vs. *Ins. Co.*, 69 N.Y., 293, the court expressly refused to determine whether the English rule should be followed. In *Ferris* vs. *Spooner*, 102 N. Y., 10, 5 N. E. Rep., 773, the defendant had broken his contract after he had entered upon the performance thereof. The court said. "When, therefore, he repudiated the further performance of the contract, the plaintiff was discharged from all obligation to either, and set at liberty to enforce his securities for the money already advanced. Obviously, demand of payment was not essential to a cause of action." In *Windmuller* vs. *Pope*, 107 N. Y., 674, 14 N. E. Rep., 436, the court appears to have recognized the English rule, but the case does not show whether the suit was brought before or after the day for performance had arrived. Moreover, the time for the vendors to commence delivery by shipment of the property agreed to be sold had arrived at the time the vendees had declared their purpose not to accept the property under the contract. The vendors appeared to have had an option to deliver at any time between certain dates. When the vendees repudiated the agreement, the time when the vendors might have insisted upon delivery had arrived, although they could, at their option, have made delivery at a later date. The vendors having a right to begin performance at the time the vendees refused to receive the property, the former might, of course, treat

the repudiation as a breach. It was not a premature repudiation of the contract, but one which occurred after the time had arrived when the vendors had a right to insist on performance thereof. All that the court held in *Crist* vs. *Armour*, 34 Barb. 378, was that premature refusal, unwithdrawn at the time for performance, was a waiver of an offer of performance at that time. In *Donovan* vs. *Sheridan*, (Super. N. Y.), 24 N. Y., Supp., 116, it appeared that the point that a premature repudiation was not a breach was not made at the trial, and the court declared that therefore it would not be considered. But the court did utter a dictum in favor of the English rule. However, it was based on New York decisions which had not at that time, at least, settled the law in that State in favor of such rule. In *Gray* vs. *Green*, 9 Hun., 334, the court said: "The effect of a mere refusal has been stated to be that if, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this of itself does not amount to a breach thereof; but, if such expression of intention remains unretracted when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance." In *Crabtree* vs. *Messersmith*, 19 Iowa, 179, the defendant broke the contract of sale after the time for performance had arrived, by returning the property, after possession thereof had been delivered to him. While the English rule is referred to, it is obvious that no question of premature breach was involved. In *Holloway* vs. *Griffith*, 32 Iowa, 409, the action was for breach of promise to marry, and the case therefore belongs to the class of cases in which a premature refusal operates as a breach of the implied agreement to continue betrothed until marriage. In *Roebling Sons* vs. *Lock-Stitch Fence Co.*, 130 Ill., 660, 22 N. E. Rep., 518, the defendant refused to perform after it had entered upon the performance of the agreement. In *Kadish* vs. *Young*, 108 Ill., 170, the court held that the premature refusal to perform was not a breach, because the other party to the contract had not elected to treat it as a breach. The same result would have been reached in that case if the English

doctrine had not been applied. In *Fox* vs. *Kitton*, 19 Ill., 519, all the court decided was that the innocent party may treat a premature repudiation as an offer to rescind the agreement. In *Chamber of Commerce vs. Sollitt*, 43 Ill., 523, it appeared that while the defendant announced his inability to perform before the time for performance arrived, yet he did not withdraw such refusal to carry out the agreement before such time, and the suit was not brought until the period for fulfillment of the agreement had come and passed. In *Follansbee* vs. *Adams*, 86 Ill., 14, the parties to the contract, after one of them (the plaintiff) had notified the other (the defendant) that he could not perform, adjusted the matter, and on his adjustment it was agreed that plaintiff owed the defendant a certain sum. Thereafter, plaintiff having sued defendant for failure to perform the contract, this settlement was pleaded as a defense. Of course, it was held that it constituted a perfect defense to the action. The contract was, by the act of the party, extinguished before the time for performance arrived. How could there thereafter be any liability thereunder? The court was not called upon to decide whether the plaintiff, by his premature refusal, had broken the agreement. The principle on which the decision rests is that the parties to a contract may, even before performance is due, extinguish it. The scope of the decision is enclosed in the last sentence of the opinion, "We are satisfied, after careful consideration of the whole record, that the court decided right in holding the contract rescinded." In *Railway Co.* vs. *Richards* (Ill. Sup.), 38 N. E. Rep., 773, the breach consisted of acts in contravention of the terms of the contract after the time for performance had arrived. The court, indeed, indorses the English doctrine, but what was said on the subject was pure dictum. In *Zuch* vs. *McClure*, 98 Pa., 541, the court held that a premature repudiation did not constitute a breach, as the innocent party did not elect to so regard it. The result in this case would have been the same if the English rule had not been adopted. In *Heard* vs. *Bowers*, 23 Pick., 455, the court intimated that, if a party voluntarily puts it out of his power to perform a contract

before the day of performance arrives he by that act breaks the agreement. See page 460. In *Dingley* vs. *Oler,* 11 Fed. Rep., 372, the court applied the English doctrine; and when this case was decided on appeal in the Federal Supreme Court (117 U. S., 490, 16 Sup. Ct., 850) that court intimated that it considered the English doctrine as sound, but the decision below was reversed on the ground that, even assuming that doctrine to be preferable, the facts did not bring the case within it, for the reason that no distinct repudiation of the agreement before the time for performance had been shown. In the case of *U. S.* vs. *Smoot,* 15 Wall., 36, the court, while leaning very decidedly towards the English rule, held that the case was not brought within its scope for the same reasons which govern the decision in that court in *Dingley* vs. *Oler.* In *Dugan* vs. *Anderson,* 36 Md., 567, the court, while not called upon to settle the question indicated that on the score of convenience it might, when called upon to settle the point, adopt the English rule. But, as we have already seen, it is indefensible to rest the English doctrine upon the mere ground of convenience, and in this case it appeared that the contract was broken while it was being performed. In *Hosmer* vs. *Wilson,* 7 Mich., 294, the action was brought to recover the value of labor expended on materials out of which an engine was to be constructed by plaintiff in error for defendant in error. The defendant in error had repudiated the contract while plaintiff in error was performing it. Of course, this was a breach of the agreement. No question of premature repudiation was involved. In *Platt* vs. *Brand,* 26 Mich., 175, it would seem that the plaintiff, against whom the defendants sought to set up by way of recoupment, a claim for damages for a breach of contract to furnish glass, had broken the contract after performance thereof had been entered upon, although at a time anterior to the time when delivery of the installment which he refused to deliver was due. In *Wolf* vs. *March,* 54 Cal., 228, it appeared that the written instrument sued upon was given on condition that it was not to be enforced until a certain mine should yield a profit to the defendant and that if it should not yield a

profit to him, the instrument was to be void. The defendant sold the mine, and the court held that the instrument at once became enforceable. By the act of sale the defendant had put it out of his power to make the mine yield a profit to him, and the court therefore very properly held that the instrument could be enforced without waiting future developments. In *Sullivan* vs. *McMillan* (Fla.), 8 South., 450, the refusal to go on with the contract was made after performance thereof had been entered upon. Therefore no question of premature refusal was involved. The court did not adopt the English doctrine. On the contrary, it stated that the case did not call for a decision on that point. The court said: "The case at bar does not, however, call for an expression of opinion as between the doctrine of *Hochster* vs. *De La Tour* and that of *Daniels* vs. *Newton*. It rests upon another and unquestionable doctrine. The time for performance was over when the breach complained of was committed. The contract was entire, and not severable in its character, and had been performed in part, at least; and upon a breach of the entire contract, it being committed by the defendant while the plaintiff was ready and willing to perform, the latter became entitled to recover in one action the same damages as if he had fully performed his contract." In *Maltby* vs. *Eisenhauer*, 17 Kan., 308, Justice Brewer said: "To what extent a contract may be held to be broken before the time for performance arrives may not be entirely settled. There are authorities which say that if, before the time for performing the contract arrives, the promisor expressly renounces the contract, the promisee may treat this as a breach, and may at once maintain an action in respect thereof. Several of these cases were for breaches of contracts to marry, and the court in many of them express themselves qualifiedly, and as doubtful whether the proposition was correct, as applicable generally to all classes of contracts. Be the proposition ever so sound, we think it is not applicable here." In *Grau* vs. *McVicker*, 10 Fed. Cas., 996, it was squarely decided that the premature repudiation of an agreement is a present breach thereof. The decision in this case is founded

entirely on *Hochster* vs. *De La Tour*. In *McPherson* vs. *Walker*, 40 Ill., 371, all the court decided was that a refusal to perform, not withdrawn before the time of performance, operates as a waiver of an offer to fulfill the agreement at the time stipulated therein. The court, so far from adopting the English doctrine, laid down the very rule we hold to be proper in cases of this kind: "The rule is if one, bound to perform a future act, before the time for doing it declares his intention not to do it, this of itself is not a breach of the contract; but, if this declaration be not withdrawn when the time arrives for the act to be done, it constitutes sufficient excuse for the default of the other party." In *Davis* vs. *Furniture Co.* (W. Va.), 24 S. E. Rep., 630, the court follows the English doctrine, but the question was not discussed. The leading decision opposed to the *Hochster* case is *Daniels* vs. *Newton*, 114 Mass., 530. Nor does it stand alone. It has been followed in *Carstens* vs. *McDonald* (Neb.), 57 N. W. Rep., 757, and *Clark* vs. *Casualty Co.*, 67 Fed. Rep., 222. See *Kelly* vs. *Oliver* (N. C.), 18 S. E. Rep., 698. That the English courts are not disposed to give the rule in the Hochster case very wide scope appears to be shown by the fact that nothing short of the most positive repudiation of an agreement will suffice to give the innocent party, at his option, a cause of action when the repudiation is premature. See *Iron Co.* vs. *Naylor*, 9 Q. B. Div., 648; *Avery* vs. *Bowden*, 5 El. & Bl., 714; *Reid* vs. *Hoskins*, 5 El. & Bl., 953; *Johnstone* vs. *Milling*, 16 Q. B. Div., 460.

Nothing decided by this court in *Davis* vs. *Bronson*, 50 N. W. Rep., 836, conflicts with our ruling in this case. There the plaintiffs and defendants had made a contract for the construction of a creamery. All that was held in that case was that plaintiffs could not, in the face of a refusal to accept, construct the creamery and then sue the defendant for the contract price. Their remedy was to sue for damages for breach of the contract. When one has contracted to erect for another a building, and the latter, when the time for commencing construction thereof arrives, refuses to permit the builder to enter upon his premises for the purpose of carrying out his

contract, it is obvious that the owner of the land has prevented the performance of the contract by the builder, and has therefore been guilty of a breach thereof. Indeed, there is eminent authority that notice that one will not stand by an agreement, though given before performance by him is due, is a present breach of the agreement, if at the time it is given the time for the other party to enter upon performance had arrived. *Danforth* vs. *Walker*, 37 Vt., 244; *Hinkley* vs. *Steel Co.*, 121 U. S., 264, 7 Sup. Ct., 875; *Hosmer* vs. *Wilson*, 7 Mich., 304; *Sullivan* vs. *McMillan* (Fla.), 8 South. Rep., 457, 458; *Dillon* vs. *Anderson*, 43 N. Y., 232; *Lamoreaux* vs. *Wolfe*, 36 N. H., 33; *Parker* vs. *Russell*, 133 Mass., 74. Whether this doctrine is sound, or whether the better rule is that such notice is merely a waiver of performance, irrevocable in character, inevitably involving an ultimate breach, it is unnecessary for us to decide. If one has agreed to manufacture and deliver certain goods at a specified time, and the other party has agreed to take them, it is evident that a notice not to manufacture them is not only a waiver of the manufacture of the article, but also of the tender of them, in fulfillment of the agreement, and the waiver is irrevocable. To advise a manufacturer that he need not manufacture, because the purchaser will not accept, is irrevocable to waive tender on the day for delivery, for he cannot deliver goods of his own manufacture without producing them. But, while a future breach is certain, can it logically be said that it has already taken place? Is it sound to declare, as some of the decisions do, that in such a case the performance by the manufacturer has been prevented? See *Cort* vs. *Railway Co.*, 17 Q. B., 127. But we express no opinion on this point, as it is not involved. What we do decide is that the letter of September 13th, although embodying a positive refusal to perform, did not place it in the power of the plaintiff to treat the contract as broken, assuming that September 30th was the day fixed for performance. But it is undisputed that under the contract the plaintiff might, at his option, have delivered the flax at any time during

the month of September. When he received the second letter from the defendants (*i. e.*, the one dated September 13th), it was in his power at that time to exercise his option to call for the performance of the agreement. The refusal of the defendants to perform was a standing waiver of tender of performance by the plaintiff, so long as such refusal was not withdrawn, and there is no pretense that it was ever retracted. For the purpose of establishing a party's liability for breach of contract, his refusal to perform, made at the time for performance, or made before and not withdrawn at that time, is equivalent to a then offer to perform by the other party, followed by a refusal by the party who so refuses before an offer is made. This is elementary law, and the principle is embodied in our Code. Sections 3774, 3820, subdivision 3, and section 3823, Rev. Codes. Had plaintiff been absolutely entitled to performance on the day he received defendants' second refusal to perform, he could, without tender of notice, have treated the contract as then broken. Does the fact that he had only an option to call for fulfillment of the agreement affect his right? We think not, so far as tender is concerned. All that was necessary to entitle him to insist on performance on any day prior to September 30th was notice to the defendants to that effect, and an offer to perform. But the unwithdrawn refusal to recognize the contract constituted a waiver of tender of performance. Whether it constituted a waiver of notice that the plaintiff then elected to exercise his option to make an earlier delivery of the flax, is another question. It is not claimed that the plaintiff in any manner brought to defendants' notice his purpose to exercise his option to call for performance before September 30th. To allow him to wait and watch the fluctuations of the market and then, after the last day for delivery had passed, claim that he had secretly decided to insist upon performance at a particular time prior thereto, or on the last day itself, according as his interests would be best subserved, would be a dangerous doctrine, and one that there is no necessity for adopting, seeing

that it was easy for him to manifest his election in a way that would make it irrevocable, and bring it to the knowledge of the defendants. He should not be afforded the opportunity of playing fast and loose with the rights of the other party, but should be required to declare his purpose, or be held, in the absence of notice to the contrary, to have elected to wait until the last day for performance. Unless this rule is adopted the vendor, who has an option to deliver at any time within six months, and who is notified by the other party immediately after the contract is made that such other party will not stand by the agreement, could remain quiet during this entire period, and then select such a day as the day when he had elected to call for performance, and therefore as the day of breach, as would give him the largest amount of damages. We hold, therefore, that the plaintiff could not claim that he decided to exercise his option to tender the property before the last day of performance, *i. e.*, September 30th. Indeed, he does not pretend that he is entitled to recover damages on a theory of a breach of the contract at any time between September 13th and September 30th. Proceeding on a hypothesis which to us is inexplicable under the circumstances, he seeks to hold defendants responsible for the difference between the contract price and the price he realized on the sale of the five thousand bushels of flax in Duluth on the 9th of September. That he cannot bind defendants for the purpose of fixing the damages they must pay by the sale in Duluth is obvious for two reasons: *First,* it was not made in the mode pointed out in the statute. The statute recognizing a settled rule of the common law permits the vendor in an executory contract of sale, the title not having passed to the vendee, to treat the property as the property of the vendee, for the sole purpose of fixing the measure of damages, and then proceed to sell it on the theory of the foreclosure of a vendor's lien for the purchase price. The property is to be sold in the manner pointed out by the statute for the sale of pledged property. The vendee is made liable for the deficiency,

if any. Sections 4833, 4988, Rev. Codes. But the sale in Duluth was not made in conformity with the provisions of the statute relating to the sale of pledged property. No notice of the time and place of sale was given to the defendants, as required by section 4760, Rev. Codes, nor was the sale at public auction upon the notice to the public usual at the place of sale in respect to auction sales of similar property, as required by section 4763, Rev. Codes. Another conclusive answer to the position taken by plaintiff that he could bind the defendants by the price realized on the sale in Duluth, is that the contract had not then been broken. It is only after breach that the statute permits the vendor to proceed to sell, as in case of a pledge, for the purpose of fixing the vendee's liability for the deficiency. Section 4988, Rev. Codes.

It is urged that by selling the five thousand bushels of flax in Duluth with a view of fixing the defendants' damages, the plaintiff chose his remedy, and hence cannot pursue any other remedy for damages. We are unable to discover that any question of remedy is here involved. If the vendee breaks his contract, the vendor may recover damages according to the rule laid down in subdivision 2 of section 4988, and section 5009, Rev. Codes, unless he has in fact proceeded under section 4833, and actually fixed the damages thereunder. It is only when the property has been resold in the manner prescribed by section 4833 that the deficiency fixes the measure of damages. If the property has not in fact been resold under that section, then subdivision 2 of section 4988 and section 5009 point out the true measure of damages. The right to hold the vendor responsible for damages on this theory is not cut off unless the property has in fact been "resold in the manner prescribed by section 4833." A mere attempt to proceed thereunder will not bar the right to damages according to subdivision 2 of section 4988 and section 5009. Nothing short of an actual sale in the manner prescribed by section 4833 will have such effect. Counsel first contends that damages cannot be recovered on the theory of a sale to foreclose a vendor's

lien, because the vendor failed to sell in the manner prescribed by section 4833; and yet *una et eadem flatu*, they insist that plaintiff should not be allowed damages under the other subdivision of section 4988—a claim utterly untenable if this fact be true. They would make an abortive attempt to proceed under section 4833 fatal to the recovery of any damages whatever, although the vendee has not thereby suffered any injury whatsoever. We cannot assent to a position so repugnant to the explicit language of the statute and so contrary to natural justice.

Having reached the conclusion that the contract was not broken by defendants before September 30th, this was the day for performance as the plaintiff had not elected to make delivery before that time. All that was necessary to put the defendants in default was a tender of performance, followed by their refusal. But an offer by plaintiff on the 30th of September was waived by their unretracted repudiation of the contract. He is deemed to have made it, and to have been met by a refusal. This constitutes a breach as of that day. If, then, there was an evidence tending to support the verdict as to the amount of damages, the verdict must be sustained, although directed by the court. The fact of liability is conclusively established. The defendants having requested the court to direct a verdict in their favor and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all contraverted facts to the court for decision; no request having been made by them after their motion for a directed verdict had been over-ruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed.

The defendants by their motion took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting which the court mut be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a ver-

dict in favor, he must, if the court denies his motion specifically request that there be submitted to the jury the questions of facts which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court, and if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in position, in case of his failure to make such requests, to claim that any issue upon which the evidence is conflicting should have been left to the decision of the jury. 2 Thomp. Trials, section 2272; *Mayer* vs. *Dean*, 115 N. Y., 550, 22 N. E. Rep., 261; *Provost* vs. *McEncroe*, 102 N. Y., 650, 5 N. E. Rep., 795; *Winchell* vs. *Hicks*, 18 N. Y., 558; *Colligan* vs. *Scott*, 58 N. Y., 670; *Merwin* vs. *Magone*, 17 C. C. A., 361, 70 Fed. Rep., 776; *Beuttell* vs. *Magone*, 157 U. S., 154, 15 Sup. Ct., 556; *Chrystie* vs. *Foster*, 9 C. C. A., 606, 61 Fed. Rep., 551; *Sutter* vs. *Vanderveer*, 122 N. Y., 652, 25 N. E. Rep., 907. It follows, as we have already said, that, if there is any evidence in the case tending to prove the amount of damages for which the verdict was directed, the defendants, not being in a position to complain that that question was not settled by the jury, are bound by the finding of the trial court, just as they would have been bound had the verdict been voluntarily rendered by the jury. On the 9th of September, plaintiff sold five thousand bushels of flax through brokers in Duluth, and realized eighty-four cents a bushel from the sale. While this evidence was perhaps competent to prove the value of the flax on the 9th of September, it has no tendency to prove its value at such a time after September 30th, as would have sufficed for the seller, acting with reasonable diligence to effect a sale. Sections 4988, 5009, Rev. Codes, fix the measure of damages in such cases. They provide as follows:—

"SECTION 4988. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him is deemed to be: (1) if the property has been resold pursuant to section 4833 the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or (2) if the property has not been resold in the manner prescibed by sec-

tion 4833 the excess, if any, of the amount due from the buyer under the contract, over the value to the seller together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof if the buyer had accepted it."

"SECTION 5009. In estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale."

In this case, there being no evidence tending to prove the value of the property at Kelso at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, the court had no basis, even on the theory that all issues of fact were submitted to it for decisions, for finding the value of the flax at that time. The state of the evidence was such that the plaintiff, while establishing a breach of the contract, had failed to show any actual damages. On the evidence as it stood, the most the plaintiff could have recovered was nominal damages. For the error of the court in directing a verdict for the plaintiff on the theory that the price realized by him on the sale of the flax in Duluth fixed the measure of his damages, the judgment and the order denying a motion for a new trial are reversed and a new trial is ordered. Under the facts of this case, the proper measure of damages is the difference between the price agreed to be paid for the flax and its market value at Kelso, at such time after September 30th as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, and the excess of expense, if any, mentioned in section 4988, Rev. Codes. See Revised Codes, section 5009.

No. 627.

No. . October Term, 1898.

Office Supreme Court U. S.
FILED
JAN 16 1899
JAMES H. MCKENNEY,

Brief of Prichard for Respondents

Supreme Court of the United States.

Filed Jan. 16, 1899.

EX PARTE JOHN ROEHM.

Answer of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading as Horst Brothers, to use, &c., to the Petition of John Roehm for a writ of *certiorari* requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination, a writ of error taken by John Roehm.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Respondents.

Allen, Lane & Scott, Prs, Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1898. No. .

EX PARTE JOHN ROEHM.

Answer of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading as Horst Brothers, to use, &c., to the petition of John Roehm for a writ of *certiorari*, requiring the Circuit Court of Appeals for the Third Circuit to certify to the Supreme Court of the United States for its revision and determination a writ or error taken by John Roehm.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The answer of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst respectfully shows:—

First.—Under the settled rule of this court as stated in Forsythe *vs.* Hammond, 166 U. S., 506, the writ of *certiorari* will only be granted when the circumstances of the case are such that "the importance of the "question involved, the necessity of avoiding conflict be-"tween two or more courts of appeal, or between courts of "appeal and the courts of a State, or some matter affecting "the interests of this nation in its internal or external rela-

"tion," demands the exercise of the power to issue such writs.

Second.—The ground urged by petitioner for the issuing of the writ is that the doctrine of anticipatory breach of contract, ordinarily known as the rule of Hochster *vs.* de la Tour (2 El. & Bl., 678), has never been affirmed by this court.

While this rule was not immediately acquiesced in by all the courts and gave rise to considerable discussion on both sides of the Atlantic, it has now been followed in so many cases, both in England and America, that it may be said to be a well-settled rule of commercial jurisprudence. There has been almost a unanimous adoption of it by the courts of the different States, and there is no conflict between the Courts of Appeals of the United States in regard to it. How completely the doctrine has been adopted by both State and Federal courts will be seen by the cases referred to and quoted in the brief for defendants in error in the Court of Appeals, which brief is annexed hereto as part of this answer.

Third.—If, however, the rule of Hochster *vs.* de la Tour could be considered as so doubtful and so important as to render it desirable that this court should pass upon it, the conclusive answer to the petition is to be found in the fact that the question is not involved in the present case.

The facts of the case were that plaintiff and defendant in 1893 made a five-year contract for the sale of hops, to be delivered in certain monthly installments in each season. For the convenience of the parties this one contract was embodied in the form of ten separate papers, all signed and dated contemporaneously, but each for one season's delivery.

After the contract had been carried out for three years, defendant refused to receive a shipment made under it, and positively declined to carry it out any further. The

case was not, therefore, one in which there had been an anticipatory breach before the time of performance commenced, but the ordinary case of a breach during performance, which gave the injured party the right to sue. In order that there may be no question as to this, reference is made to the following portions of the record:—

Testimony of John Roehm, the defendant (printed page 54):—

Q. In August, 1893, you made a five-years' contract for your hops at twenty-two cents per pound?

A. Yes, sir.

Q. At that time these four pieces of paper were signed, were they not?

A. Yes, sir.

Q. There were six other pieces of paper for the previous three years?

A. Yes, sir.

Opinion of Dallas, Circuit Justice, in refusing new trial (Record, printed page 30):—

I am still of opinion that the plaintiffs' right to compensation accrued at the time of the defendant's anticipatory breach of the several contracts, which were treated by the court, and correctly, I think, as constituting a single one.

Extract from opinion of Court of Appeals:—

In August, 1893, Paul R. G. Horst, E. Clement Horst and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, "to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months, or one season. They

all bear the same date, are similar as regard the quantity of hops to be delivered and the price to be paid; they differ only in the time of delivery and the year's crop from which delivery was to be made.

Upon these facts the question as to the adoption of the rule of Hochster *vs.* de la Tour does not arise. The breach complained of was not a breach before the time for performance had arrived, but the breach of an executory contract during the course of performance and after it had been partially executed. There is no conflict of opinion with regard to the right of immediate suit in such a case. In England the point is ruled by

Cort *vs.* Ambergate R. W. Co., 17 Q. B., 126,

and in this court repeated decisions have affirmed the rule.

In the case of

Lovell *vs.* St. Louis, &c., Ins. Co., 111 U. S., 264,

the court (Mr. Justice Bradley delivering the opinion) said:—

As the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he sustained thereby.

And the reason for the rule is well stated by Mr. Justice Brewer in the recent case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540-551,

as follows:—

Wherever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. In other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

The one reason urged by petitioner, viz., that the rule of Hochster *vs.* de la Tour should be expressly passed upon by this court, falls to the ground since the question is not involved in the present case.

It is submitted, therefore, that the case is not one for *certiorari* under the rule laid down in Forsythe *vs.* Hammond, already cited.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Respondents.

United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT.

John Strohm, Plaintiff in Error,

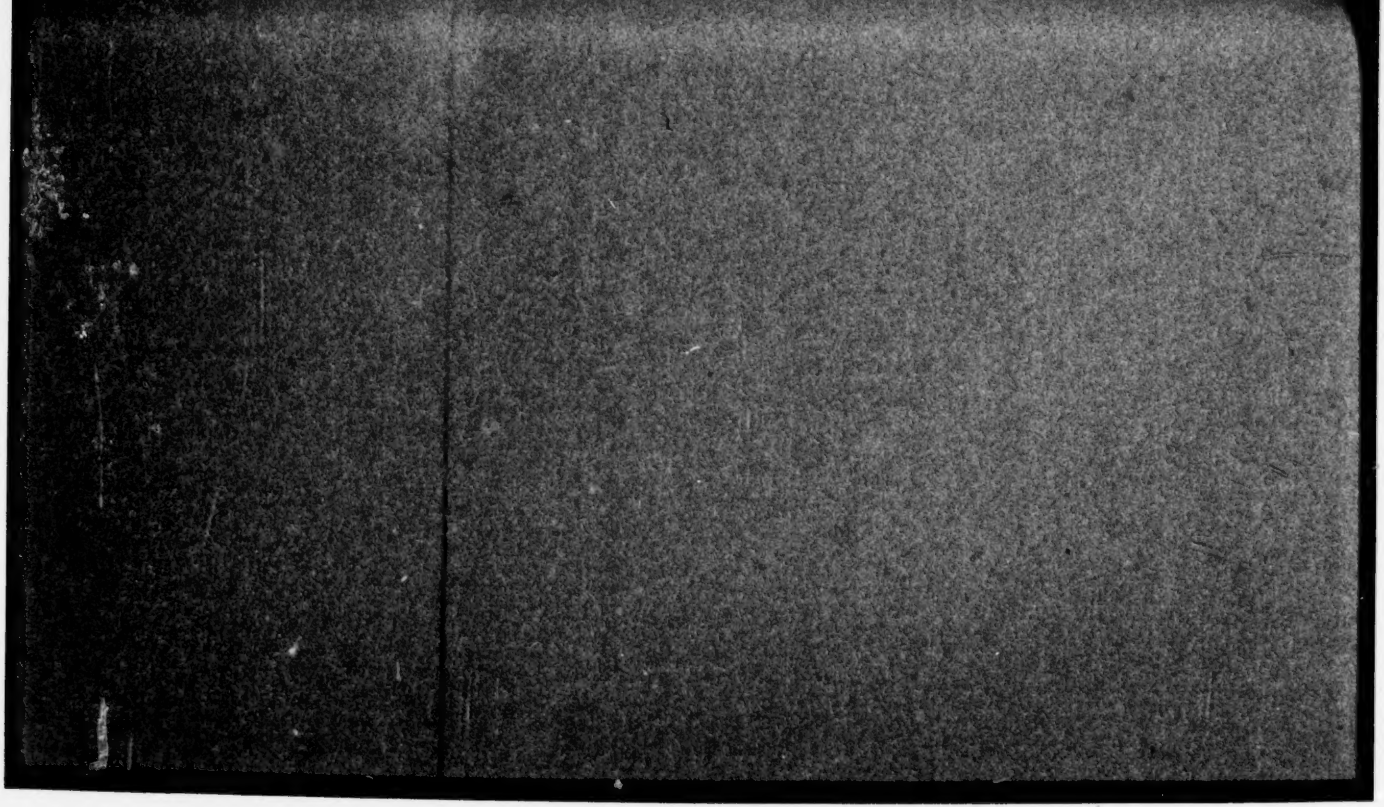
vs.

Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.



UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

John Roehm, Plaintiff in Error,

vs.

Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

September Term, 1898.

No. 33.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

COUNTER STATEMENT.

The history of the case, in the brief of the plaintiff in error, contains some errors.

It is true that the suit grows out of a contract for the sale and delivery of hops made by a firm of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, with John Roehm, a brewer. This was substantially one contract for a five years' supply of hops, but the delivery for each season of five months was embodied in a separate written paper, all ten of the papers, however, being

executed at the same time, in pursuance of the one agreement. (Record, folios 97, 98, printed page 54.) The contract provided for the delivery of a certain quantity and specified grade of hops each month, with a provision that any difference of opinion as to quality should be submitted to arbitrators mutually chosen.

It is not true, as stated in the history of the case in plaintiff in error's brief, that this contract was entered into at the solicitation of Paul R. G. Horst, and in reliance upon his expert knowledge. On the contrary, the defendant, Roehm, himself testified (Record, folio 98, printed pages 54, 55) that this contract was made with E. Clemens Horst, and it was also the uncontradicted evidence that E. Clemens Horst was the member of the firm who did all the selecting and purchasing of Pacific Coast hops for the firm (Record, folio 139, printed page 78); and it was also the evidence of the defendant himself (Record, folio 100, printed pages 55, 56) that so far from relying upon the judgment of Horst Brothers, or of any partner, it was his practice to take samples of the shipments, submit them to an expert and accept or reject the shipments upon the report of such expert.

It is true that on June 23d, 1896, after three years' deliveries, covered by six of the papers, had been made, the firm of Horst Brothers dissolved. This dissolution took place by the retirement of one partner, Paul R. G. Horst, the other two partners continuing the business under the same firm name. The retiring partner assigned his interest in the Roehm contract to his copartners, and commenced a new business on his own account. The remaining partners of the firm of Horst Brothers were at all times ready and willing to continue to fill the contract with Roehm, and in point of fact sent to him the next shipment due under it. He not only refused to receive this, but in letters from himself and his counsel (Record, folios 15, 16 and 17, printed pages 10–12) declared in the most explicit terms, and against the protest of Horst Brothers, that he would not carry out the contract for the two remaining years covering two hundred bales of the crop of 1896 and two hundred bales of the crop of 1897 and included in the four remaining

papers, and that he would treat this contract as at an end, and purchase his supplies elsewhere. Thereupon the present suit was commenced by the three partners of the original firm, to the use of the two remaining partners, to recover damages.

BRIEF OF ARGUMENT.

The case will be considered under the four propositions contained in the brief of plaintiff in error :—

First.—IS THE FIRST PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ., "THE DEFENDANT WAS NOT REQUIRED "TO ACCEPT PERFORMANCE FROM THE ASSIGNEES OF THE PAR- "TIES WITH WHOM HE HAD CONTRACTED?"

It is not necessary to examine in detail the cases cited by the plaintiff in error, since they will be found to group themselves in two classes, viz., first, cases in which there was an attempt to sue by a legal plaintiff, who had no contract at all with the legal defendant; and, second, cases in which the contract was of such a personal character that it formed an exception to the general rule of assignability of contracts.

Of the first class, the case of

Humble *vs.* Hunter, 12 Q. B., 64 E. C. L., 310,

is an example. In that case the charter party was made between C. J. Humble, owner, and Jameson Hunter. The suit was brought by Jameson Hunter against *Grace* Humble, and it was attempted to justify the suit by proof that Grace Humble was the real owner. The conclusive answer to the suit was that whatever might have been the rights of the plaintiff against the defendant in the suit, he could not recover against such defendant upon a charter party to which the defendant was not a party.

The cases of Bolton *vs.* Jones, Boston Ice Co. *vs.* Potter, and National Bank *vs.* Hall, cited by plaintiff in error, fall within the same class. They were all cases where the legal plaintiffs, who were not parties to the contract, sought t-

recover on the ground that the contract was really with them, a ground which of course failed with the production of the contract.

Of the second class of cases, the case of

Arkansas Smelting Co. *vs.* Belden Mining Co., 127 U. S., 379,

cited by plaintiff in error, is a good example. In that case the vendor of certain lead ore had a contract by which, before payment, the ore was delivered to the vendees to be assayed and the amount of various minerals contained therein ascertained. The vendees assigned their entire contract to a stranger, and it was held that the peculiar provisions of the contract which involved the delivery of the ore to the vendees for assaying, and the intrusting of the ore to them prior to the ascertainment of the price, involved such a personal reliance upon the character and solvency of the vendees as made the contract one of a personal character, and not assignable. It is observable that even in this case the court suggested that, if instead of being an assignment to a stranger, there had simply been a change in a partnership by the coming in or withdrawal of a partner, the change might have been held to have been in contemplation of the parties; and the court also expressly distinguished the case from an agreement to sell and deliver goods at a fixed price, payable on delivery.

The defendant in error takes no issue with the principles laid down in the cases cited by the plaintiff in error on this point, but entirely acquiesces in them. There is nothing in the judgment of the court in this case which at all conflicts with them; and, in fact, the application of the principles established in these cases to the facts of the case in which the present appeal is taken, would be fatal to the contention of the plaintiff in error.

In the first place, it is to be observed that the written contract contains nothing to indicate that it involved anything of a personal character. It was a contract for the sale and delivery of goods. The vendors were to deliver certain goods

of a specified kind and quality at stipulated times. The vendee was to accept and pay for those goods. Neither party agreed to accept the judgment of the other; but, on the contrary, it was provided that in case of dispute as to the quality of the goods delivered, arbitrators should be selected. So far, therefore, as the terms of the contract are concerned, it was clearly one which did not fall within the exception mentioned in the cases cited by plaintiff in error.

The contract being in writing could not be varied by the oral testimony; but, assuming that the oral testimony of the defendant was admissible, it destroys instead of substantiating his contention. It appeared that he made the contract not with the partner who retired, but with one of the partners who remained in the firm. (Record, folio 98, printed page 55.) If he relied upon anybody, it appeared that he relied upon the partner from whom he bought, since he said of that partner at the time of the contract: "If you are as good as your brother, I will depend on you." (*Idem.*) It further appeared that this partner from whom he bought was the partner who, in all previous sales to him, had selected the hops, and who selected the hops shipped to him under this particular contract. In fact, he was the partner who bought all that kind of hops for the firm. (Record, folios 138, 139, printed pages 78, 79.) It further appeared that, in point of fact, the defendant did not rely upon the judgment of either partner, but it was his practice to call in an expert to examine the shipments of hops, and he rejected or approved them upon the judgment of that expert. (Record, folio 100, printed pages 55, 56.)

Even, therefore, if this had been a case of an assignment of the contract to a stranger, the defendant would have been liable under the doctrine of the cases whose authority he invokes.

The case, however, was not one of an assignment to a stranger, but was the ordinary case of the retirement of a partner from a firm, and the assignment of his interest in firm assets. In such a case the contracts of the firm are not abrogated, unless it clearly appears in some particular contract that it involved the personal services of the partner who re-

tired. All the partners, including the retiring partner, remain liable upon the contracts, and are bound to perform them. The mere fact that the firm is dissolved by the retirement of one partner, or that he assigns to the other his interest in the firm contracts, does not ordinarily relieve the parties contracting with the firm any more than it relieves the firm from performing its contracts with third persons. This is familiar law, and the plaintiff in error cites nothing contrary to it, except a paragraph from Parsons on Partnership, which, taken by itself, would seem to announce broadly the opposite doctrine. A reference, however, to the book from which it is taken will show that it is the concluding paragraph of a section which deals entirely with two classes of contracts, namely, contracts of guarantee, and contracts which have particular reference to the individual skill of the withdrawing partner. Read in connection with its context and the cases cited in the foot note, it will be seen that it was never intended to announce the broad doctrine in support of which it is now cited, but that it referred to the classes of cases then under discussion by the learned author.

The citation from Lindley on Partnership, immediately preceding it in plaintiff in error's brief, states undoubtedly the true doctrine, which is that a contract with a firm may be abrogated by dissolution, if it is of a purely personal character requiring the services of the party who withdraws.

It is not necessary to cite many authorities to support the proposition that ordinarily the dissolution of the firm by the withdrawal of a partner does not relieve parties from the obligation of contracts entered into with the firm. A few cases, however, may be referred to.

The exact point involved in this case was involved in the recent case, in the Court of Appeals of Kentucky, of

Campbellsville Lumber Co. *vs.* Bradlee, 96 Kentucky, 494, 29 S. W. Rep., 313.

In that case a corporation having a contract to sell certain lumber for cash to a firm, refused to deliver under the contract after the retirement of one member of the firm. The court held that this was not a good defense, saying:—

The main, indeed only, excuse pleaded by the defendant for refusal to carry out the contract, was the transfer by Bradlee of his interest in it to Wiggins without the consent of the defendant, whereby, as argued, it became unenforceable. It seems the transfer was made upon dissolution of the firm of Bradlee and Wiggins, the benefit of that contract falling to the latter in division of the assets. But as Bradlee did not, nor could not, in virtue of either the dissolution or transfer to Wiggins, release himself from the undertaking by the firm to pay the defendant for the lumber upon delivery, we do not see how the latter was affected, nor upon what principle it could be released from its undertaking. If it was, then the dissolution of a partnership would in all cases put an end to each mutual or reciprocal contract the firm may have entered into, however profitable or advantageous. But it does really no more take away the rights of individual members under such contracts than it releases him from obligations to perform.

It is true the written assignment did not have the effect to divest the firm of Bradlee and Wiggins of the legal title; but that does not prevent a recovery in this action, brought by the proper parties plaintiff.

To the same effect was the case of

Fish *vs.* Gates, 133 Mass., 441.

In that case a firm composed of two partners undertook to do certain specified work on fifty sets of table irons. Before much of the work was done the firm was dissolved, and the work was performed by a person under the supervision of one partner alone. The declaration was upon a contract performed by the firm, and for money due the firm. It was held that the dissolution was no defense, the court saying:—

The defendant made a special contract with the plaintiffs as copartners to do work for him. In any suit to enforce this contract, or any liability growing out of it, both partners must be joined as plaintiffs. The defendant contracted with them jointly, not with either of them separately. The dissolution of the partnership before the work was completed had no effect upon the rights or liability of the defendant.

To the same effect was

Holmes *vs.* Shands, 27 Miss., 40,

which was a suit in the name of a firm to recover for work, most of which had been done after dissolution, it was held that the firm could recover, the court saying:—

The contract was made with the firm during the existence of the partnership, and it was competent for the parties after dissolution to carry out a contract previously made and in part performed.

Second.—IS THE SECOND PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ: "THE PLAINTIFFS WERE NOT ENTITLED "TO SUE IN OCTOBER, 1896, FOR THE BREACH OF CONTRACTS "WHICH, BY THEIR TERMS, DID NOT MATURE UNTIL AFTER SUIT "BROUGHT."

This question is not necessarily involved in the present case. It appeared from the evidence of the defendant (Record, folios 97, 98, printed page 54) that there was really but one contract made between plaintiff and defendant for the delivery of hops during a period of five years, and that this contract had been partially performed by the delivery of three years' supplies of hops, and the tender and refusal of one instalment upon the next year's supply. For convenience, each year's delivery was embodied in a separate paper; but, in point of fact, there was but one contract, the defendant's testimony on this point being corroborated by the letters written by the defendant and his counsel repudiating the contract and printed on pages 10 and 12 of the Record. The obligation of the defendant to receive the hops is spoken of as a "contract," "for "the hops of the crop of 1896 and 1897," which necessarily included not only the obligation of the paper under which deliveries were then due and which included only hops of the crop of 1896, but the remaining papers. It is this entire contract for hops of the crop of 1896 and 1897 which is annulled. As the papers were but the evidence of the contract, not the contract itself, the separation of the deliveries into a number of papers would not prevent the contract from being a single one. It was thus treated by the court below, as appears by the opinion on the motion for a new trial on printed page 30 of the Record. If this is the case, the doctrine of

Hochster *vs.* De la Tour, 2 Ell. & Bl., 678,

is not involved, since it was the law long before that case was decided, and still continues to be the law, that where a vendee refuses to accept one delivery under circumstances which show intention to repudiate the entire contract, the vendor

may treat this refusal as a breach of the whole contract, and bring an immediate action for damages for his entire loss.

Cort *vs.* Ambergate Railway Co., 17 Q. B., 126 (1851).

The principle upon which this rests cannot be better stated than in the words of Mr. Justice Brewer, in the case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540–551.

> Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. In other words, he may abandon it and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

If, therefore, this transaction is treated as one contract, as the defendant in error contends it should be treated, the question of the soundness of the doctrine of Hochster *vs.* De la Tour becomes unimportant, since the case then becomes the ordinary one of a defendant who repudiates a contract after it has been partially performed by the plaintiff.

Assuming, however, for the purposes of the argument, that these separate pieces of paper, which were intended as the evidence of the contract made on the twenty-fifth day of August, 1893, were separate and independent contracts, the question is raised whether, upon a distinct and unequivocal repudiation and refusal to carry out the contracts by the defendant, the plaintiff could accept the situation thus tendered, treat the contracts as abandoned and sue for the damages caused by the breach.

The question raised in

Dingley *vs.* Oler, 117 U. S., 490,

as to whether the refusal to perform was distinct and unequivocal, does not arise in this case, since the letters of the defendant and his counsel (printed page 12 of Record) contain the most absolute and distinct refusal to take not merely hops of the crop of 1896, which was all that the paper under which

delivery was then tendered referred to, but " hops of the crop " of 1896 and 1897," deliverable by plaintiff to defendant. And the previous letter of defendant, printed on page 10 of the Record and referred to in the letter on page 12, puts the matter beyond all doubt by mentioning the quantity of hops covered by the four papers in suit as the hops the obligation to take which the defendant repudiated. The sole question, therefore, is as to the effect of this repudiation.

It would seem somewhat late in the day to question the authority of the case of Hochster *vs.* De la Tour. That case has been uniformly followed in England.

Danube, &c., Co. *vs.* Kenos, 13 Com. Bench, N. S., 825;
Frost *vs.* Knight, L. R., 7 Exchqr., 111;
Roper *vs.* Johnson, L. R., 8 Com. Pleas, 167.

It has been accepted by the majority, if not all, of the text writers, and its doctrine is usually stated in the text books without qualification. With one exception it has been accepted and followed by every State court of last resort in which the question has been presented, and the great weight of authority in Federal courts, including a very recent decision of a Court of Appeals, is in its favor.

In Pennsylvania, the case first came before the courts in an action in the District Court of Philadelphia, the opinion being delivered by Judge Hare.

Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442.

The discussion of the case by this eminent jurist is extremely interesting. In the course of his opinion, speaking of the repudiation of the contract, he says :—

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon, may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase money. But an unqualified refusal on his part is an irreparable breach which leaves no room for a

subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage, and charge the purchaser with the difference.

At the end of the opinion, in speaking of the doctrine in Hochster *vs.* De la Tour, he adds:—

The doctrine may, therefore, be regarded as established in England, and from its intrinsic reasonableness will in all probability prevail in the United States.

This prophecy has since been literally fulfilled. Since that time, the doctrine has been repeatedly approved by the Supreme Court of Pennsylvania.

Zuck *vs.* McClure, 98 Penna., 541;
Hocking *vs.* Hamilton, 158 Penna., 107.

The facts of this latter case were that the defendant agreed to buy from plaintiff fifty thousand tons of coal in monthly instalments of about four thousand tons per month, at a certain price per ton, the contract being a severable contract, under the doctrine of Scott *vs.* Kittanning Coal Co., 89 Penna., 231. After a portion of the coal had been delivered, the defendant repudiated the contract. He subsequently sent various orders to plaintiff for coal, which were filled and for some of which he paid. Plaintiff then brought suit for the amount due for the unpaid bills of coal, and also for the failure to accept the full amount of coal under the contract. The defendant defended on the ground that under the contract, if it was enforced, payment for the coal shipped under it would not be due until after the commencement of the suit. The court sustained the recovery, stating as the correct principle of law the following quotation from the American and English Encyclopedia of Law, vol. 3, page 904:—

If before the time for the performance of a contract has arrived, one party announce to the other that he does not intend to perform his promise, the latter may treat the contract as broken and bring an action immediately against the former for the breach. It is not necessary that he should postpone his suit until the time for performance has arrived.

In New York, the Court of Appeals in
Burtis *vs.* Thompson, 42 N. Y., 246,

cited Hochster *vs.* De la Tour, but said that they are not fully prepared to concur in the judgment of the case, without further consideration. Subsequently, however, in

Howard *vs.* Daly, 61 N. Y., 362,

the case was thoroughly discussed and approved by the judge who delivered the opinion, and in

Windmuller *vs.* Pope, 107 N. Y., 674,

it was expressly approved and followed by the court. It is now the settled law of that State.

The courts of Maryland have approved the doctrine of Hochster *vs.* De la Tour in the case of

Dugan *vs.* Anderson, 36 Md., 567.

Miller, J., delivering the opinion of the court, said:—

The defendant's first prayer denies the right of the plaintiff to recover damages for the alleged refusal of the defendant to take the plaintiff into partnership on the first day of March, 1871, under the contract alleged and sought to be set up, because the action was instituted prior to that time. The proposition thus announced by the defendant's prayer is a denial of the law of Hochster *vs.* De la Tour, 20 Eng. L. & Eq. Rep., 157, and of the English cases that have followed and sanctioned that decision. * * * The principle of this decision in cases to which it has been held applicable is, that there is a breach of the contract when the pomissor repudiates it and declares he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages, the repudiation of the contract by the other party, and the announcement that it never will be fufilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it, the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly. The contract having thus been broken by the promissor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause for action, and damages be assessed and recovered in respect of it, though the time for the performance

may yet be remote. It is obvious that such a course must tend to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promissor, the promisee may in many cases avert, or at all events, materially lessen the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or wo uld have been diminished.

In the case of

Hosmer *vs.* Wilson, 7 Mich., 294,

the Supreme Court of Michigan, Christiancy, J., delivering the opinion, said:—

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed, and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine when it should be completed was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light as respects the plaintiff's remedy as an absolute physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort *vs.* Ambergate Railway Company, 6 E. L. & Eq., 230; Derby *vs.* Johnson, 21 Vt., 21; Clark *vs.* Marsiglin, 1 Denio, 317; Hochster *vs.* De la Tour, 20 L. & Eq., 157.

In the case of

Crabtree *vs.* Messersmith, 19 Iowa, 179,

the Supreme Court of Iowa, Cole, J., delivering the opinion, said:—

The action was commenced on the twenty-third day of December, 1861. There was evidence introduced tending to show that by the terms of the original contract of sale the defendant had his option to pay for the machine in money or in grain, as he earned it with the machine, at any time by or before Christmas, 1861. The evidence also tended to show that the defendant had taken the machine back to plaintiffs and expressly renounced the contract of purchase under which he had taken possession of it, and left the State and did not return until after Christmas, 1861. The fourth instruction asked by the plaintiffs and given by the court was, in substance, that if the jury believed from the evidence that before this suit was commenced the defendant had declared that he would not retain or pay for the machine, and left the State without making provision

for the payment, and did not return till after the time fixed for payment, that such acts were evidence tending to show an abandonment of the contract which would entitle the plaintiff to bring this suit before the expiration of the time fixed for the delivery of the grain. The defendant claiming that the suit was prematurely brought, relied thereon in the District Court as a defense to the action, and asked the court, in several instructions prepared by his counsel, which were refused, and which embraced the same idea in different phraseology, to instruct the jury that if this suit was commenced before the time had expired in which the defendant was to deliver the grain, then the plaintiff could not recover. The giving and refusing to give these respective instructions was not error. The rule of law is well settled, that if before the time of performing the contract arrives the promisor expressly renounce the contract, the promisee may treat this as a breach of said contract, and may at once maintain an action in respect thereof. Chitty on Contr., 799; Hochster *vs.* De la Tour, 2 Ellis & B., 678; Avery *vs.* Bowden, 5 *Id.*, 714; Elderton *vs.* Emmons, 6 Com. B., 160; Bowdell *vs.* Parsons, 10 East., 359; Lamoreaux *vs.* Rolfe, 36 N. H., 33.

Followed in

McCormick *vs.* Basal, 46 Iowa, 235.

In the case of

Fox *vs.* Kitton, 19 Ill., 518,

the Supreme Court of Illinois, Breese, J., delivering the opinion, said:—

We are disposed to attach more importance under the circumstances of this case to the conduct and declarations of the defendant at Chicago than his counsel seem to do, and are disposed to regard them as affording good grounds for prompt action on the part of the plaintiff, and as conferring the right upon him of avoiding the contract altogether. The defendant had agreed for the season ensuing the nineteenth day of May to run the vessel in the Buffalo and Chicago trade, and pay over the net earnings as fast as earned to the plaintiff. His undertaking, it seems to us, is of that description, and falls under that class of cases to which we have been referred, where a party agreeing to do an act at a future day, and before that day arrives declares he will not keep his contract or do the act, that the other party may act on the declaration and bring the action before the day arrives. * * * We think the declarations of the defendant and his refusal at Chicago to accept the services of plaintiff's agent to procure a cargo for Buffalo, gave the plaintiff a right to consider the new contract as repudiated, and justified him in taking possession.

Followed in

Follansbee *vs.* Adams, 86 Ill., 13.

In the case of

Kurtz *vs.* Frank, 76 Ind., 594,

the Supreme Court of Indiana, Woods, J., delivering the opinion, said:—

* * * But if this were otherwise, and if by its terms the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action. Burtis *vs.* Thompson, 42 N. Y., 246; Holloway *vs.* Griffith, 32 Iowa, 409; Frost *vs.* Knight, L. R., 7 Exch., 111.

In the case of

Davis *vs.* Grand Rapids School Furniture Co., 24 S. E., 630,

the Supreme Court of West Virginia, Holt, J., delivering the opinion, said:—

Instruction No. 4 was in effect that if the contract was binding, then the defendant had until the fifteenth day of August, 1893, in which to comply with the same, and no right of action could accrue to the plaintiff until the time which defendant had in which to comply had fully expired. This was properly refused, for the defendant had notified plaintiff that they did not intend to comply at all, and plaintiff had a right to take them at their word and sue for whatever damage the plaintiff thereby sustained.

In the case of

Remy *vs.* Olds, 88 Cal., 537,

the Supreme Court of California, Fitzgerald, J., delivering the opinion, said:—

The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by the defendants, when the plaintiff was not in default, and after he had removed from and vacated, and the defendants had entered upon and taken possession of, the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue, without waiting for the time to arrive for the performance of the other conditions.

In the Federal Courts the question first came up in

Hancock *vs.* The N. Y. Life Ins. Co., 13 Am. Law Reg., N. S., 103 (11 Fed. Cases, 402).

This was a suit against a life insurance company, which,

during the life of the person insured, repudiated the contract. The case was tried in the Circuit Court for the Eastern District of Virginia, before Bond, C. J. The plaintiff's counsel contended that under the doctrine of Hochster *vs.* De la Tour, the plaintiff was entitled to a recovery. The court sustained this ruling, and a verdict was rendered for the plaintiff.

The next case was the case of

Grau *vs.* McVicker, 8 Biss., 13 (10 Fed. Cases, 996).

In that case Drummond, C. J., said:—

I think that the principles decided in the case of Hochster *vs.* De La Tour, reported in 20 Eng. Law & Eq., 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant on the continent of Europe for a time, commencing on the 1st of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract; in other words, that he did not want him as a courier. Thereupon, before the 1st of June, the plaintiff commenced an action against the defendant and recovered, and the question came up before the Court of Queen's Bench whether the action under such circumstances, could be maintained. And the unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to the 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action

against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.

The next case was the case of

Dingley *vs.* Oler, 11 Fed. Reps., 372,

in which the question came before the Circuit Court for the District of Maine. The opinion of the court, approving and applying the doctrine of Hochster *vs.* De la Tour, was delivered by Lowell, C. J. In the course of that opinion he says :—

The defendants having unqualifiedly refused to ship the ice, this action may be maintained, though brought before the close of the season, if the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, is to be followed. That doctrine is that in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. Frost *vs.* Knight, L. R., 7 Ex. 111.; Roper *vs.* Johnson, L. R., 8 C. P., 167; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Burtis *vs.* Thompson, 42 N. Y., 246; Howard *vs.* Daley, 61 N. Y., 362. These cases seem to me to be founded in good sense and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

The judgment in this case was reversed in

Dingley *vs.* Oler, 117 U. S., 490,

but upon other ground, the Supreme Court declining to express an opinion as to the doctrine of Hochester *vs.* De la Tour.

In the case of

Foss Schneider Brewing Co. *vs.* Bullock, 59 Fed Rep., 83 (16 U. S. Appeals, 311),

Taft, C. J., in delivering the opinion of the Circuit Court of Appeals, said :—

It is true that where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms, but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such and consider the contract at an end.

In the case of

Edward Hines Lumber Co. *vs.* Alley, 73 Fed. Rep., 603 (43 U. S. Appeals, 169),

the Court of Appeals for the Sixth Circuit recognized the doctrine of Hochster *vs.* De la Tour as in force. In that case there was a contract to manufacture and sell lumber, and to pay for it in installments within sixty days after portions of it were piled. The suit was brought within less than sixty days after the piling of the whole lumber, and the question was whether there had been a repudiation of the contract by the defendant prior to the time for performance. The Court of Appeals held that the Circuit Court properly instructed the jury:—

> That as a matter of law, the plaintiff in error by its letter of September 1st had renounced the contract and had refused performance absolutely and unconditionally, and had therefore breached their agreement to receive not only the installment it was asked to receive at the time, but had committed a breach of the entire contract.

In the very recent case of

Marks *vs.* Van Eeghen, 85 Fed. Rep., 853 (57 U. S. Appeals, 149),

decided by the Circuit Court of Appeals for the Second Circuit, March 2d, 1898, the exact point came before the court. Wallace, C. J., delivering the opinion, said:—

> It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of

the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvray, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick, *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Sloss Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action.

Against this current of authority there are but two cases, viz.,

Daniels *vs.* Newton, 114 Mass.; and

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222.

With regard to the first of these cases, it may be observed that it is not only in conflict with all the other authorities in the State courts, but is inconsistent both with the earlier and later decisions of the Supreme Court of Massachusetts.

In the earlier case of

Collins *vs.* Delaporte, 115 Mass., 159,

the Supreme Court of Massachusetts approved the principle of

Cort *vs.* Ambergate Railway Co., 17 Q. B., 127,

which they cite, and say that upon the defendant's refusal to carry out an executory contract, the plaintiff might treat the contract as then broken. And in a case later than Daniels *vs.* Newton, viz.,

Whitten *vs.* New England, &c., Ins. Co., 165 Mass., 343,

the court allowed an action to be brought on a policy of in-

surance which promised to pay within sixty days after the approval of the claim, upon proof that although the sixty days had not expired, the insurance company had denied all liability. It is true that in this later case the court attempt to distinguish Daniels *vs.* Newton, but the distinction is not very obvious, since in both cases the time for performance had not arrived when suit was brought.

With regard to the Federal case of

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222,

it was a decision of a District Court, and is entirely contrary to the overwhelming weight of Federal authority.

So great is the weight of authority in favor of Hochster *vs.* De la Tour that it may be now regarded as an established rule of commercial law in this country as well as in England, and the defendants in error might well rest their case upon this alone.

If, however, the question was one to be considered *de novo*, without the light of authority, it would be clear that in the administration of mercantile law the doctrine announced in Hochster *vs.* De la Tour is the one which should be adopted by the courts. This doctrine is not, as the counsel for plaintiff in error contends, a novel departure from the common law. On the contrary, it is simply a development of the principles of that law.

It is well settled that if an executory contract is to be performed in installments, a breach of one installment of the contract will, under certain circumstances, entitle the other party to treat such breach as a breach of the entire contract, and to bring a suit at once for the damages sustained by the entire breach, although the time for the performance of the other installments may not yet have arrived. This rests upon the principle stated by Mr. Justice Brewer, and already quoted in this brief, that whenever one party to an executory contract is guilty of such a breach as indicates his intention to repudiate the contract, the other party may accept the situation which the wrongdoer has brought about and recover all his dam-

ages which he suffers through breach of the entire contract. Indeed, any other doctrine would be an absurdity. If A. orders from B. goods to be delivered in installments over a period of several months, and A. upon delivery of the first lot of goods not only declines to receive them, but repudiates the contract, it would seem strange indeed if B. could not accept the situation thus tendered, cancel his arrangements for obtaining the goods and bring suit for his damages. As was pithily said by Lord Campbell, in Cort *vs.* Ambergate Railway Co., 17 Q. B., 127–139, "If it were law, it could not be sense."

This being undoubtedly the law with regard to executory contracts repudiated in the course of performance, what logical difference can there be with regard to executory contracts repudiated prior to the commencement of performance? In both cases the action is brought before the time for complete performance, and may be brought for damages for a breach of a contract prior to the time when the plaintiff was entitled to complete performance. In both cases the same difficulties exist in the way of measuring damages. All that can be urged against the one doctrine can be urged against the other. The analogy of commercial paper, which was suggested by the learned judge who delivered the opinion in Daniels *vs.* Newton, and which is strenuously insisted upon by the counsel for plaintiff in error in his brief, presents no real difficulty. Simple contracts for the payment of money are somewhat different from executory contracts for the purchase of goods, and this difference is constantly recognized in the application of legal principles. Contracts for the payment of money are not wholly executory contracts, but are executed on one side, the consideration having passed, and are executory only so far as the party who signs the promissory note or bond is concerned. It is well settled that in an executory contract for the delivery of goods in installments, a breach of one installment under circumstances which indicate a repudiation of a contract, will entitle the other party to the contract to consider the contract as broken and sue for damages for its entire breach; but the same rule would not apply to a bond for the

payment of money in instal'ments, where the default in the payment of one installment would only give an action for the recovery of that installment, unless there was an express provision in the bond that the whole should become due if one installment were in default. This distinction between contracts for the payment of money and contracts for the delivery of goods has always been recognized in the case of a breach during performance, and there would seem to be no difficulty in recognizing it in the case of a breach before performance has commenced.

It is submitted that on principle alone, irrespective of any authority, the doctrine of Hochster *vs.* De la Tour is sound, and the fact that it is met with the approval of such an array of courts is in itself very conclusive evidence of this.

Third.—IS THE THIRD PROPOSITION OF THE PLAINTIFF IN ERROR CORRECT, VIZ.: "THAT THE MEASURE OF DAMAGE "WAS NOT THE DIFFERENCE BETWEEN THE PRICE AT WHICH "FORWARD CONTRACTS COULD HAVE BEEN OBTAINED AT A "DATE LONG PRIOR TO THE TIME OF DELIVERY AND THE "CONTRACT PRICE, BUT THE DIFFERENCE BETWEN THE MAR-"KET AND CONTRACT PRICE AT THE TIME WHEN DELIVERY "SHOULD HAVE BEEN MADE AND ACCEPTED."

It will be observed that this point really depends upon the plaintiff in error's second proposition. If, either in the case of an executory contract repudiated during performance, or an executory contract repudiated prior to any performance, suit can only be commenced after the expiration of the time for complete performance, then the measure of damages is the difference between the contract price and the market price at the date of delivery. If, however, in either case suit may be brought before the time for complete performance, then the plaintiff in error's proposition is not correct if its meaning is that the court must wait until the date of complete performance before estimating the damages. If a suit may be commenced before the time for complete performance, it may, of course, be tried before that time, and in such cases it would be impossible to obtain in advance market quotations for a future date. The rule in such cases is to give to the plaintiff compensation

based as far as possible upon the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

In the ordinary contract for the sale of goods not specific, the loss is the profit which the seller would have made. This is usually measured by the difference between the contract price and the market value at the date of delivery, because:—

First.—If the vendor did not purchase the goods until the date of delivery, his profit would be the difference between the contract price and the market price at that date.

Second.—If the vendor purchased the goods prior to the date of delivery, he could sell them at the date of delivery for the market price, and hence his profit remains the same.

The rule as to market price, however, is not an arbitrary rule, but only applies in such cases because it is necessarily the best measure of the plaintiff's loss. Where, however, before the entire completion of the contract the vendee repudiates it, it is necessary to ascertain the damage in other ways. If the vendor was to manufacture the goods, and in the process of manufacture the contract is repudiated, he is not bound to complete the manufacture and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance.

Hinckley *vs.* Pittsburgh, &c., Co., 121 U. S., 264;
Gallagher *vs.* Whitney, 147 Penna., 184.

It is, of course, obvious that in such cases the manufacturer may actually obtain his profit before the time fixed for performance, and may recover on a basis of cost which might have been increased or diminished by subsequent events, but the party who broke the contract before the time for complete performance cannot complain, and takes the risk of loss or profit by such anticipation of the time.

If the vendor has to buy instead of to manufacture, the same principle prevails. He need not keep the goods on hand, or subsequently buy goods to fill the contract. He

can show what was the value of the contract by showing for what price he could have made subcontracts, this price corresponding to the cost of manufacture in the case of a manufacturer. He too may receive his money earlier in this way and may gain or lose by the estimation of his damage in advance of the time for performance, but, as was said by Mr. Justice Brewer, he has the right to accept the situation tendered to him, and the other party cannot complain.

The case of

Roper *vs.* Johnson, L. Reps., 8 C. P., 167,

cited by plaintiff in error, is not inconsistent with this. In that case it was held that the plaintiff was not precluded from recovering damages because he did not or could not show that he could have made a forward subcontract. Grove, J., says:—

> If there had been any materials here to show that at the time of the breach the plaintiffs could, without extraordinary trouble, have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages.

The principle adopted by the court below was applied and elucidated by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in the case of

Nichols *vs.* The Scranton Steel Company, 137 N. Y., 471–487:—.

> We hold, however, that by the repudiation the plaintiff is absolved from the further delivery of iron under the contract, and that an action to recover damages arising from defendant's refusal to receive and pay for such iron may be at once commenced. We do not think the fact that some iron had been delivered, the time for the payment of which had not, by the terms of the contract, arrived when the suit was commenced, makes any difference.
>
> If it were not for a repudiation of the contract, nothing could be recovered as damages for the iron not delivered, because by the terms of the contract such delivery and payment would not be due; but when the defendant does repudiate the contract and refuse on its part to fulfill its terms, it cannot be heard to say that the other party must himself be bound by it, and must await the expiration of the term of credit provided for by it before any action can be maintained under it. The plaintiff does not recover the moneys as being the contract price strictly and technically, but as damages for the breach of the contract by the defendant. And those damages would be the present worth of the moneys payable under the contract at the time therein provided. Thus, if the moneys

were to be due at the end of four months from the time when the iron was, by the terms of the contract, to be delivered, the measure of damages would be, in such case, the present worth of an obligation to pay money due at such a certain time.

It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal.

With regard to the suggestion of the plaintiff in error that there was no sufficient evidence to be submitted to a jury that forward contracts could have been secured, the complete answer is that such a question is not raised by the assignments of error. Evidence on this point was offered and admitted, and no question relating thereto is involved in the present appeal. The evidence, it is submitted, was ample; but whether it was or not, the point is not raised by the assignments.

Fourth.—IS THE FOURTH PROPOSITION OF PLAINTIFF IN ERROR CORRECT, VIZ., "THE CONTRACTS WERE INDEPENDENT, "AND THE REFUSAL TO ACCEPT TENDER UNDER THE FIRST "GAVE NO CAUSE OF ACTION UNDER THE OTHER THREE"?

This is a new point, first appearing in the brief on appeal. It rests entirely upon a misunderstanding of the facts. It has already been argued that the contracts were not independent, but were really parts of one contract; but even if this were not so, the repudiation by the defendant was not of one of the contracts, but of all of them. It needs only a reference to the letters of the defendant and his counsel (on printed page 12 of the Record) to see that what was repudiated was not only the defendant's obligation under one of the papers,

but was a repudiation of his liability under all of them. True, he alludes to them as a "contract" of August 25th, 1893, this being in accordance with his understanding that the papers constituted but one contract; but he speaks of considering his contract at an end, and of his making arrangements for purchasing supplies elsewhere, and he refers to and confirms his previous letter of June 27th, 1896 (printed page 10 of the Record), which specifically refers to the contracts for furnishing all the hops both of the crop of '96 and of the crop of '97, and says that he considers those contracts as annulled. The point is put beyond all question, however, by the letter of his counsel (printed on page 12 of the Record), in which he refers to the contract as a contract to "furnish hops of the crop of '96 and '97," which covered not merely the paper under which the shipment then tendered was sent, but all the four papers remaining of those executed on August 25th, 1893. These four papers covered two years' supplies, viz., two hundred bales of the crop of 1896 and two hundred bales of the crop of 1897. It is manifest upon reading all these letters that all of the papers signed on Auguat 25th, 1893, whether constituting one contract or four contracts, were repudiated by the defendant, and that there was a distinct and unqualified refusal to perform any of them. With regard to this proposition of the plaintiff in error, therefore, it is clear:—

First.—That if the papers are regarded as but parts of one contract, a breach of that contract had actually occurred after the time for the commencement of performance, and suit was properly brought.

Second.—If the papers are considered as separate contracts, there was a distinct and unqualified refusal to perform them all, and if the doctrine of Hochster *vs.* De la Tour is sound, the suit was properly brought.

For the reasons above given, it is submitted, the judgment of the court below should be affirmed.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.

No. 188.

No. 188. October Term, 1899.

Office ... Court U. S.
FILED
JAN 29 1900
JAMES H. McKENNEY,
Clerk.

Brief of Prichard & Garver

IN THE

Supreme Court of the United States.

Filed Jan. 29, 1900.

John Roehm, Plaintiff in Error,

vs.

Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

INDEX.

	PAGE
Statement of the Case	1
Argument	2

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

John Rochm, Plaintiff in Error, vs. *Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst, Defendants in Error.*	October Term, 1899. No. 188.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiffs below were hop growers and dealers and defendant was a brewer. In August, 1893, they made an arrangement by which plaintiffs below were to sell and deliver and defendant below was to buy and receive hops in certain specified quantities and at certain specified prices during ten seasons of five months each (two seasons in each year), the whole arrangement covering a period of five years. In pursuance of this arrangement they executed ten separate papers of even date, each called a "hop contract" and each cover-

ing the shipment of hops for a season of five months. Except for the times of delivery the contracts were identical. Both parties proceeded to carry out the arrangement, and after hops had been shipped for three years and paid for, the defendant unequivocally and positively declined to further carry out the arrangement or to receive any of the hops covered by the four remaining "hop contracts." Plaintiffs below thereupon tendered one shipment, which was refused, this refusal being accompanied with a letter declining to take any of the hops of the crop of 1896 and 1897 (the hops covered by the remaining four "hop con- "tracts"), and stating that defendant had made arrangements to purchase his stock from other parties. Plaintiffs thereupon brought the present action at law upon all four "hop contracts." This action was brought after the date fixed for the first delivery under the first of the four "hop "contracts" and after such delivery had been tendered, but before the dates fixed for the first deliveries under the other three "hop contracts," which extended over a period of two years. Plaintiffs recovered a judgment, and the question sought to be raised by this appeal is whether the action was premature as to three of the "hop con- "tracts."

BRIEF OF ARGUMENT.

In the court below two defenses were set up to the action.

One was that the retirement of one partner from the seller firm and the assignment of his interest to his copartners put an end to the contract, and justified the buyer in rescinding it.

The other was that the absolute refusal of the buyer to carry out the contracts gave no rights of action prior to the respective times fixed for performance, and therefore that as the contracts were for successive periods and as prior to the suit the time for delivery had only arrived in the case of one of them, the action must fall as to the other three.

The first defense seems to be abandoned in this court, and is not argued.

The second defense raises the question decided in England by the case of Hochster *vs.* De la Tour, 2 El. & Bl., 678, in which it was held that an absolute refusal to carry out a contract might give an immediate right of action, although the time for performance had not arrived. This is the principal question argued in the brief of plaintiff in error.

Before discussing this question, it is proper to call the attention of the court to the fact that it is not necessarily involved in the present case. While it is true that the contract between the parties was evidenced by ten separate papers, each called a "hop contract," it is equally clear from the evidence that there really was but one contract made for the delivery of hops in certain installments for five years, and that the execution of the ten separate pieces of paper called "hop contracts" was simply a means of conveniently evidencing this arrangement. The parties in their testimony and correspondence sometimes alluded to these papers as contracts, and sometimes to them as "a five years' contract," according to whether they were thinking of the separate pieces of paper or of the one arrangement.

In the first letter of the defendant, dated June 27th, 1896 (Record, page 29, folio 35), he speaks of the "con-"tracts," but in the final letter of repudiation of October 24th, 1896, written by defendant's counsel (Record, page 33, folio 39), it is stated that "he regards your *contract* "with him to furnish hops of the crop of 1896 and 1897 "annulled." In defendant's testimony (Record, page 45, folio 54), the defendant speaks of the ten pieces of paper as a "five years' contract," and later (Record, page 46, folio 55), he states "that's the reason I signed the con-"tract."

Similarly, the plaintiffs in their correspondence and letters sometimes allude to the transaction as "a contract," and sometimes as "contracts."

The circuit judge before whom the case was tried without a jury, in his opinion on the motion for a new trial (Record, page 25, folio 30), speaks of—

> The several contracts which were treated by the court, and correctly, I think, as constituting a single one;

and the Circuit Court of Appeals, in its opinion (Record, page 92, folio 110), says:—

> In August, 1893, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, entered into a *contract* with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at a uniform price of twenty-two cents per pound. Of the whole quantity, six hundred bales had been delivered, accepted and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. * * * The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months, or one season. They all bear the same date; are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made.

There can be no doubt from the record that as the result of one negotiation the plaintiffs and defendant entered into one arrangement for the furnishing of one thousand bales of hops, and that the contract was broken by the defendant after six hundred bales had been delivered and paid for. If this is so, the case is not one of a breach of a contract before the time for the commencement of performance, but the case of a breach of a contract while in course of performance. In such case there is no conflict of authority, and it is well settled by the decisions of this court, that if the breach is such as to show a renunciation of the entire contract, the other party may accept the situation and bring suit at once for his entire damages, even though the time for the performance of the remainder of the contract has not arrived.

Lovell *vs.* Insurance Co., 111 U. S., 264;
Anvil *vs.* Humble, 153 U. S., 540;
Pierce *vs.* Tennessee Coal, &c., Co., 173 U. S., 1.

Assuming, however, that the transaction of August 25th, 1893, is to be treated not as one transaction, but as a series of ten wholly independent contracts, bearing no relation to each other and not dependent upon or in consideration of each other, then the doctrine of Hochster *vs.* De la Tour is directly involved in this case. Three years' supply of hops had been furnished, and six of the so-called hop contracts had been filled. Four remained unfulfilled. A shipment made under the first of the four was tendered and refused, and this refusal was accompanied by a declaration that the defendant considered the contract for all the remaining hops, viz., the crops of the years 1896 and 1897, annulled, and would refuse to carry out the arrangement. If the doctrine of Hochster *vs.* De la Tour is not good law, plaintiffs would be obliged to bring four suits, one on each of the so-called hop contracts. In the present suit he could recover only on the "hop contract" for the deliveries in October, November and December, 1896, and January and February, 1897, under which the shipment for October was tendered. For any relief on the other contracts, he would be obliged to wait until the time came for the first month's delivery.

Whether the doctrine of Hochster *vs.* De la Tour is sound law has never been decided by this court. It is alluded to as an open question in the cases of—

Dingley *vs.* Oler, 117 U. S., 490-503;
Pierce *vs.* Tennessee Coal, &c., Co., 173 U. S., 1-2.

The present case contains the element missing in Dingley *vs.* Oler, of a distinct unequivocal and absolute refusal to perform. The four contracts covered the crops of two years, viz., the crops of 1896 and 1897. The first letter of defendant, dated June 27th, 1896 (Record, page 29, folio 35) stated:—

I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm for the furnishing to me of two hundred bales of prime Pacific Coast hops of the crop of 1896, and two hundred bales of prime Pacific Coast hops of the crop of 1897, which,

of course, you cannot fulfill. I therefore consider the contracts as annulled, and will make other arrangements for the purchase of the hops that I may need.

And in the letter of defendant's counsel of October 24th, 1896 (Record, page 33, folio 39), which constituted the final breach, and which was written at the close of the correspondence, and after a formal tender of a shipment of hops had been made, it was said:—

I am instructed by my client, Mr. John Roehm, of this city, to notify you in confirmation of his communication of June 27th, that for reasons therein stated he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

It will thus be seen that there was an absolute refusal persisted in after remonstrance and accompanied by a declaration that defendant had made arrangements to purchase his stock elsewhere.*

The question whether the doctrine of Hochster *vs.* De la Tour, viz., the doctrine that there may be an anticipatory breach of a contract by an absolute refusal to perform it, should be adopted by this court will be discussed under three propositions, as follows:—

***First.*—The decision in Hochster *vs.* De la Tour is not inconsistent with the principles and precedents of the common law, and is inherently reasonable.**

***Second.*—It has become the settled law of England as applied to executory contracts for the manufacture or sale of goods, and has been almost universally accepted by the courts of the United States.**

***Third.*—The Supreme Court of the United States, while it has never passed upon the question, has repeatedly adopted and applied the principles upon which the ruling of Hochster *vs.* De la Tour is founded.**

---

* The correspondence subsequent to the suit referred to on page 33, folio 40, of the Record, related to a suggestion of compromise, and did not involve any waiver of the breach which had been acted upon by bringing suit.

These propositions will be considered separately.

FIRST.—THE DECISION IN HOCHSTER vs. DE LA TOUR IS NOT INCONSISTENT WITH THE PRINCIPLES OR PRECEDENTS OF THE COMMON LAW, AND IS INHERENTLY REASONABLE.

The case of Hochster *vs.* De la Tour was decided by the Court of Queen's Bench in 1853, and is reported in 2 El. & Bl., 678 (75 E. C. L.). The plaintiff was a courier, who, on April 12th, 1852, had entered into an agreement with defendant to serve him as a courier for three months from June 1st, 1852. On May 11th, 1852, the defendant wrote to plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. On May 22d, the plaintiff brought an action at law against defendant for breach of contract, and the question involved was whether the positive refusal of the defendant to carry out the contract was an immediate breach which entitled plaintiff to bring his action before the time fixed for the commencement of performance. The court held that there had been a breach of contract which entitled the plaintiff to sue, and entered judgment upon a verdict for plaintiff.

It has been sometimes loosely stated that this decision introduced into the common law of England the principle that there could be a breach of a contract before the time fixed for the commencement of its performance, and, in fact, most of the objections that have been urged against the soundness of this decision have been based upon this assumption.

Chief Baron Kelly, whose opinion in the court below in the subsequent case of

Frost *vs.* Knight (L. R., 5 Ex., 322, and L. R., 7 Ex., 111),

is the most elaborate English dissent from the doctrine, says in his opinion in that case:—

> But to say that the contract is broken is simply to utter an untruth. One contracts in 1870 to pay to another £100 on the 1st of January, 1871.

To say that the contract is broken before the year 1870 is at an end is undeniably and self-evidently untrue. It seems equally clear and uncontrovertible in fact, that a promise by a man to marry a woman after his father's death is not and cannot be broken while his father is yet alive.

And Mr. Justice Wells, of the Supreme Court of Massachusetts, whose opinion in

Daniels *vs.* Newton, 114 Mass., 530,

is the leading American dissent, says:—

An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action.

This, however, was not the real issue raised by the case of Hochster *vs.* De la Tour. It has always been a principle of the common law, both before and since Hochster *vs.* De la Tour, that there could be a breach of a contract before the time arrived for the commencement of its performance. It has, for instance, always been the law that if one party to a contract destroyed the subject matter of the contract, or disabled himself so as to make the performance of the contract impossible, the act of destruction or the creation of the disability was in itself a breach of the contract, and gave rise not to a special action for damages, but to an action on the contract in which the antecedent destruction or disability was treated as a breach. This principle of the common law is very clearly stated by Sir Frederick Pollock in

Pollock's Principles of Contract, 6th ed., 410,

as follows:—

We now come to the case of a contract becoming impossible of performance by the default of either party.

Where the promisor disables himself by his own default from performing his promise, not only is he not excused (for which, indeed, authority would be superfluous), but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it.

He cites in a foot note, as illustrative of this, the following:—

1 Rolle's Abr. 448 B., citing 21 E. IV., 54 pl. 26: "If you are bound to "enfeoff one of the manor of D. before such a feast, and you make a "feoffment of that manor to another before the feast, you have forfeited "the bond, notwithstanding that you have the land back before the feast, "having once disabled yourself from making the said feoffment," per Choke, J.

The principle, therefore, that there may be a breach of the contract prior to the date fixed for the commencement of its performance did not originate with Hochster *vs.* De la Tour. What was novel with that case was the question whether an absolute and unequivocal renunciation of the contract by one party was equivalent to an act which rendered the contract impossible of performance, such as the destruction of the subject matter or the creation of a disability. The question was not whether the court should step aside from the path of prior decisions, but whether it should make a step forward in that path. Any discussion of the doctrine of Hochster *vs.* De la Tour which overlooks the important fact that it was, and always had been, a principle of the common law that there could be a breach of contract giving a legal right to damages before the time fixed for the commencement of performance of the contract, will only lead to a misunderstanding of the scope of that decision and its relation to the principles of the common law as established by other cases. An examination of the authorities prior to Hochster *vs.* De la Tour will show that not only was it established that an act which rendered the performance of the contract absolutely impossible was in itself a breach (a doctrine so inherently reasonable that no one would dispute it), but that the doing of an act by either party which was wholly inconsistent with the obligation which he was under to the other was a breach, even though, as Sir Frederick Pollock puts it, it might in contingent circumstances become possible to perform the contract. It is not always clear

upon what theory these decisions were based. In the case of conditions annexed to grants of land, the theory seems to have been that the parties were entitled to have the estates kept "in the same plight," and in other covenants the act seems to have been considered, in the language of the old commentators, "contrary to the "intent of the covenant;" but whatever the theory, the doctrine was undisputed. Perhaps the earliest statement of it is that already referred to as cited by Sir Frederick Pollock, and which also appears in

Viner's Abridgment, vol. V., 224,

as follows:—

If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken. 21 Ed., 4, 55.

As if the condition be to enfeoff before Michaelmas; if before the feast he enfeoffs another, though he after repurchases, yet he cannot perform the condition. 21 Ed., 4, 55.

And in

Coke on Littleton, section 358,

is is said:—

In the same manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter, &c., *causa qua supra*, for whosoever cometh to the lands by the feoffment of the feoffee, they ought to be liable, and put in execution by force of the statute merchant, or of the statute staple.

And Sir Edward Coke adds:—

And here it is to be understood that the grant of the rent charge is a present disability of the feoffee, and therefore albeit the grantee doth bring a writ of annuitie and discharge the land of it, *ab initio*, yet the cause of entrie being once given by the act of the feoffee the feoffor may re-enter. And so it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter.

The like law is of any judgment given against the feoffee wherein debt or damages are recovered.

In

Sir Anthony Main's Case, 5 Coke's Reps., 21*a*.

Sir Anthony Main leased certain lands to Scott for

twenty-one years, and covenanted that at any time during the life of Scott, upon surrender of the lease, he would make a new lease. Sir Anthony Main afterwards accepted a fine, by which he granted the land for eighty years, whereupon Scott brought an action of covenant without offering to surrender. It was held that Sir Anthony Main had broken his covenant. The decision of the court, as stated in the report, was as follows:—

1. That Sir Anthony Main had broken his covenant without any surrender made, for by the said fine levied by him for eighty years, he had disabled himself either to take a surrender or to make a new lease; and the law will not enforce any one to do a thing which will be vain and fruitless *lex nemini cogit ad vana seu inutilia peragenda:* but it would be vain to compel him to make a surrender to him who cannot take it: and although the lessee in this case by the words of the indenture ought to do the first act, *scil.* to make the surrender, yet when the lessor hath disabled himself not only to take the surrender, but also to make a new lease according to the covenant, for this cause the lessor's covenant is broken without any surrender made. *Vide* 32, E. 3. Barre., 264 and 21, E. 4. 55 a. If you are bound to enfeoff me of the manor of D. before such a feast, if you make a feoffment of the said manor to another before the said feast, you have forfeited your obligation, although you repurchase the land again before the feast, because you were once disabled to make the feoffment. And therewith agreeth Temp., E. 1, Covenant, 29. If a man leases a manor for years, and covenants to keep the houses of the manor and as much as was in the manor in as good plight as he found them, during the term; the lessee committed waste in the houses, and in cutting of oaks, the lessor brought an action of covenant before the end of the term for the oaks, because for them it was impossible that the covenant should be performed: otherwise it is of the houses; and therewith agree F. N. B., 145, 7 and 12, E. 3 Lit., Covenant 2.

In the case of

Griffith *vs.* Goodhand, Sir T. Ray, 464.

the plaintiff brought an action of covenant, alleging that the defendant covenanted to sell and deliver to the plaintiff, for seven years from a certain date, seven parts of all the grains made in defendant's brew house. The plaintiff brought an action of covenant, assigning as a breach that the defendant, "with intention to deceive the plain-"tiff, did put divers quantities of hops into the malt of "which the grains were made, by reason whereof the

"grains were spoiled and became unprofitable to the plain-"tiff." The verdict was for the plaintiff, and it was moved, in arrest of judgment,

That this breach is out of the articles, namely, the putting the hops into the grains, and the damages being entire, the plaintiff ought not to have judgment.

Judgment, however, was given for the plaintiff.

In the case of

Bowdell *vs.* Parsons, 10 East, 359,

defendant had purchased from plaintiff twelve loads of hay, which he agreed to deliver to plaintiff upon request, as plaintiff might want it. After one load had been taken away and paid for, the defendant sold the remaining hay to other persons, whereupon the plaintiff brought suit and recovered a verdict. A motion was made in arrest of judgment, on the ground that the plaintiff had not sufficiently alleged a request. With regard to the argument that in one count of the declaration no request at all was alleged, Lord Ellenborough said:—

There is clearly a sufficient breach laid in that count, for by the defendant's selling and disposing of the rest of the hay to other persons he disqualified himself from delivering it to the plaintiff, and therefore no request was necessary.

In the case of

Amory *vs.* Brodrick, 1 Dow. & Ry., 361,

plaintiff declared on the covenant in an indenture by which defendant assigned a bond to plaintiff, and covenanted that he would ratify and confirm all actions which plaintiff might bring on the bond. The breach alleged was that defendant, prior to an action commenced by plaintiff, had released the bond. There was no averment that after the action was commenced he had been requested to confirm the action. On demurrer, the declaration was sustained.

Bayley, J., said:—

As to the first ground of demurrer I am clearly of the opinion that the breach is well assigned. The defendant covenants that he will avow, justify, maintain and support any action that may be brought. The plaintiff says you have not avowed, justified, maintained and supported

one action that I have brought, for you have disabled yourself from so doing by executing a release to Rowe. The substantial part of the breach is that the defendant had disabled himself from keeping his covenant, and that is a good breach to maintain the action.

Holroyd, J., said:—

I think that the objection first taken, that there is not a sufficient breach assigned, is not available. Here the party covenants to do a particular thing, and the breach assigned is that he has done an act whereby he has rendered himself incapable of doing that thing. That is a good breach.

In the case of

Ford *vs.* Tiley, 6 Barn. & Cr. (13 E. C. L., 154) plaintiff and defendant entered into an agreement, dated January 23, 1824, that the defendant should, at plaintiff's expense, with all possible speed after he should become possessed of or in possession of a certain public house, execute a lease thereof, from the 21st of December, 1825, for fourteen or twenty-one years, at a certain yearly rent. At the time of this agreement, the house was out upon a lease which would not expire until midsummer, 1827, and the legal estate was also vested in trustees, in trust, by lease or mortgage to raise money to pay debts, and then to pay to Betty Tyler £25 per annum for her life. On June 24th, 1825, during the existence of the outstanding lease, and also during the lifetime of Betty Tyler, the defendant joined with the trustees in making a new lease to a stranger for twenty-three years from September 29th, 1825, whereupon the plaintiff brought *assumpsit* to recover from defendant damages for a breach of the contract to give him a lease when defendant should obtain possession. A verdict was rendered for plaintiff, but the question as to whether the action was brought prematurely was reserved. The court (Bayley, J., delivering the opinion) said:—

It was objected at the trial, and the question was saved, whether the action was not premature, on the ground that the lease, which was in *esse* at the time of the agreement, would not have expired till midsummer, 1827, and was still, as to these parties, to be deemed a subsisting lease; but though we are satisfied that that lease is, as between these parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a

right to have the possession, we are of opinion that the action is maintainable, because, by the lease of June, 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of June, 1825, subsists, to grant the lease he stipulated to grant. It is very true, the defendant may obtain a surrender of that lease before midsummer, 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. In 1 Roll. Abr., 248, pl. 1 (Vin. 225), it is said: "If a day be limited to perform a condition, if the obligor once "disables himself to perform it, though he be enabled again before the "day, yet the condition is broken: as if the condition be to enfeoff an- "other before Michaelmas; if, before the feast, he enfeoff another, "though he after repurchases, yet he cannot perform the condition"; and he cites 21 Edw., 4, 55, where Choke, who was then one of the justices of C. B., so lays it down. The same may be collected from Co. Litt., 221*b*, where, upon a feoffment on condition to re-enfeoff, on payment of a certain sum by the feoffor or his heirs before a certain day, a distinction is taken between a disability in the interim, on the part of the feoffor or his heirs, and a disability on the part of the feoffee, a removal of the disability before the day from the feoffor or his heirs, entitling them to require a reinfeoffment, and the removal from the feoffee being no saving to him of the consequences of a breach; and Lord Coke adopts Littleton's reason, "maintenant by disability of the feoffee the "condition is broken, and the feoffor may enter." Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be the breach of a contract to grant a lease to J. S. at a given day, and, *a fortiori*, will it be a breach so long as the lease to such stranger remains in force. In this case, therefore, where the defendant has contracted to grant the plaintiff a lease as soon as he is possessed or in possession, and he will be entitled to the possession as soon after midsummer, 1827, as Betty Tyler, the annuitant, shall die, and he has created a present disability in himself to grant such lease, if Betty Tyler shall die before the term to have been inserted in such lease would have expired, we are of opinion that the defendant's contract was broken by his joining in the lease of 1825; and, therefore, that the rule for a nonsuit cannot be made absolute. It appears to us, however, that the damages, to the extent to which they have been given, cannot be supported; and we think (unless the parties can agree) that there ought to be a new trial, that the rule by which the damages should be regulated may be more distinctly laid down to the jury. The damages upon the first count certainly cannot be supported, for that is founded upon the supposition that the defendant might have been possessed if he would; whereas,

without the consent of the trustees, he had no right at law to possess till midsummer, 1827, and the death of Betty Tyler. The second or third counts may be supported, in respect of that part of them which charges that the defendant has run from his agreement, because we think his destroying his chance of the right of possession is running from his agreement; but then the measure of damages should be, not the value of a lease for fourteen or twenty-one years, from December, 1825, but the value of a lease for so much of that term as, upon a calculation of the probability of the period of Betty Tyler's death, would be likely to be subsisting at the arrival of that period. The rule for a new trial must, therefore, be made absolute.

In the case of

Short *vs.* Stone, 8 Q. B. (A. & E. N. S.), 358 (55 E. C. L.),

the action was in *assumpsit*, and alleged that the defendant had promised the plantiff to marry her within a reasonable time next after he should thereunto be requested, and that the defendant, disregarding his promise, had married another person. There was a plea by defendant that he was not at any time before the commencement of the suit requested by plaintiff to marry her. To this plea plaintiff demurred. The case was elaborately argued on both sides. The four judges delivered separate opinions, as follows:—

Lord Denman, C. J.: We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract, and the intention clearly is to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered; and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me the true construction of the contract, the plaintiff shows a good right of action and is entitled to judgment.

Patteson, J.: The only difficulty I had was on the averment of a promise to marry within a reasonable time after request. If the allegation had been of a promise, generally, to marry, or a promise to marry on request, or in a reasonable time, the application of the case in Lord Raymond would have been clearer. But, on consideration, I do not see any rational distinction between the averments of a promise to marry on request and a promise to marry in reasonable time after request. We must look to the intention; and if a party puts himself out of the condition in which a request could properly be made, he dispenses with the

request. Here it is alleged that the defendant married another person. It was not necessary to show that that person was living when the action was commenced; here was a breach of contract, at once, when the defendant married.

COLERIDGE, J.: The declaration is good, and the plea bad, for the same reasons. The promise to marry within a reasonable time after request must mean after request within a time when it might reasonably be made. If the defendant disables himself from fulfilling such a request, then, in the first place, he dispenses with the request, because it has become impossible to make the request effectually; and, secondly, he has broken his own contract, because he is no longer able to fulfill that. It is no matter how long the person whom the defendant has married lives, the contract having been once broken; and the averment of a request to fulfill it is immaterial.

WEIGHTMAN, J.: I am of the same opinion. The facts stated in the count show a dispensation with the request to marry.

In the case of

Lovelock *vs.* Franklyn, 8 Q. B. (A. & E. N. S.). 371 (55 E. C. L.),

the action was in *assumpsit* upon a promise to assign all the defendant's interests in certain premises to the plaintiff within seven years from a certain date, and the breach alleged was that within the seven years the defendant conveyed the premises to another. There was a demurrer on the ground that the mere transfer to a stranger was not in itself a breach. The judgment was for the plaintiff, the court saying:—

LORD DENMAN, C. J.: The plaintiff has a right to say to the defendant: "You have placed yourself in a situation in which you cannot perform what you have promised. You promised to be ready during the "period of seven years; and during that period I may at any time "tender you the money and call for an assignment, and expect that you "should keep yourself ready; but, if I now were to tender you the "money, you would not be ready." That is a breach of the contract. No case contradicts this view; the language in the authorities relied upon by the defendants relates to a different state of things. Where a party agrees to sell, or to lease, on a given future day, he may have all the intermediate time open to him for acquiring the means of performing his contract; but here the party puts it out of his power to perform what he has agreed to perform; that is, to assign at any time at which he may be called upon. This distinction shows that the passage cited from Lord Coke is inapplicable; that proves no more, on the point now before us, than that, if an act is to be performed at a future time specified, the con-

tract is not broken by something which may merely prevent the performance in the meantime. We are introducing no novelty. In all the cases put for the defendants the party had the means of rehabilitating himself before the time of performance arrived; here he has incapacitated himself at the very time when he may be called on and should be ready.

PATTESON, J.: In this particular contract the defendant has undertaken to keep himself ready for the whole time, but he has parted with all his interest and has made it impossible for himself to perform if now called on. Coleridge, J., concurred.

The law was the same on this side of the Atlantic. In the case of

Newcomb *vs.* Brackett, 16 Mass., 161 (decided in 1819),

A. agreed to convey land to B., as soon as B. should pay the residue of a debt to him. Before B. had paid or tendered the residue of the debt, A. transferred the land to another party, whereupon B., without tendering the balance of the debt, or requesting a deed, brought suit against A. There was a demurrer, on the ground that the declaration did not show either payment of the residue of the debt or demand for a deed; but the court held that the transfer by A. to a stranger was in itself a breach. Chief Justice Parker, delivering the opinion, said:—

It is implied in the contract, on the part of the defendant, that it would do nothing by which he should become unable to perform it; and by making a deed to another person he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the $200 in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage.

This opinion is supported by several decided cases, which are collected by Mr. Metcalf in a note to the case of Raynay *vs.* Alexander, in his valuable edition of Yelverton's Reports, page 76. The case in the text is: The plaintiff declared upon a promise to deliver, on a particular day, fifteen out of seventeen tods of wool, to be chosen by the plaintiff, upon payment of £6, and averred that he was ready to pay the £6 on the day, yet the defendant had not delivered the wool. Verdict for plaintiff, and judgment arrested, because not averred that the plaintiff had chosen the fifteen tods out of the seventeen, which was a condition precedent. But Popham, C. J., said, if the defendant had sold one of

the tods of wool before the election made by the plaintiff, that he had destroyed the election and made the promise absolute, and had been a breach of it. The same law, if the defendant would not have permitted the plaintiff to see the wool, that he might make election; for that had excused the act to be done by the plaintiff, and had been a default by the defendant.

Prior to the decision in Hochster *vs.* De la Tour it had also been settled that if a contract provided for a series of acts, and default was made in the performance of one of them, accompanied by an express or implied refusal to perform the rest, the other party was not only relieved from the duty of performing his part of the contract, but he might treat the default and refusal as a breach of the entire contract—not only of the particular act as to which default was made, but as to all the other acts which were to be done in *futuro*—and that damages might be assessed for the breach of the entire contract. Thus, in the case of

Cort *vs.* Ambergate, &c., Railway Co., 7 Q. B. (A. & E. N. S.), 127 (79 E. C. L.),

there was a contract for the manufacture of thirty-nine hundred tons of railway chairs, to be delivered in certain specified monthly quantities, from March, 1847, to November, 1847, and from January, 1848, to May, 1848. After a portion of the chairs had been delivered, the defendants, on January 31st, 1848, refused to further carry out the contract, or to accept any chairs. Plaintiffs brought suit, claiming damages for the entire contract. The defendants pleaded, *inter alia*, that the plaintiffs had not been ready and willing to carry out the contract, nor had defendants prevented and discharged them from supplying the residue of the chairs. There was a verdict for plaintiff. A motion for a new trial was made, upon the ground that the evidence showed that after the notice from the defendant, the plaintiff tendered no more chairs, and it was argued to the court that they were bound to make the tender. The court said:—

Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that when there is an executory contract for the manufacturing and supply of goods from time

to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract. * * *

We are likewise of opinion that in this case the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered and which the defendants refused to accept.

And in the case of

Elderton *vs.* Emmonds, 6 Man. Gr. & S., 160 (60 E. C. L.), affirmed on appeal, 4 H. L. Cas., 624, a case which had been decided by the Court of Exchequer Chamber in 1848 and which was affirmed in the House of Lords about the same time that Hochster *vs.* De la Tour was decided, it had been settled that where there was an employment by the year and a discharge before the end of the year, that discharge might be treated as in itself an immediate breach of the entire contract, and suit brought upon it alleging such breach in the pleadings. Mr. Justice Crompton, in his opinion in the House of Lords, said (page 645) :—

It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times, and which is, that after a dismissal, the servant or party employed may recover such damages as a jury may think the loss of the situation has occasioned. * * *

The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in Smith's Leading Cases. He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or, of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed.

And Mr. Justice Erle said (page 655) :—

The agreement for the services of an attorney, at an annual salary, appears to me to constitute the relation of employer and employed for not less than a year; and the breach shows that this relation was put an end to, contrary to the contract so understood. It follows, according to the general law relating to contracts, that an action lies for this breach of contract as soon as it has taken place, and that the measure of damages is an indemnity to the plaintiff for his loss by the breach.

As the law stood, therefore, at the time the case of Hochster *vs.* De la Tour came before the courts, it was well settled that there could be an anticipatory breach before the arrival of the time, or the performance of the condition, at or on which the contract was to be performed. In the case of a contract the time for the commencement of performance of which had not arrived, any act which rendered the contract impossible of performance, or which caused a present disability on the part of one of the parties, was such an anticipatory breach, and could be so pleaded in an action on the contract. It not only relieved the other party from performing, but also constituted a breach which gave him a right of action. It was said by Lord Campbell, in the course of the argument of Hochster *vs.* De la Tour (page 683):—

> It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach.

And in the case of a contract, the performance of which had actually been commenced, a default accompanied by a refusal, express or implied, to carry out the remainder of the contract, was an anticipatory breach of all the remaining provisions.

The real question before the court, therefore, in Hochster *vs.* De la Tour was not whether there could be a breach of contract before the time fixed for performance, but assuming that there could be such a breach, did the positive and absolute refusal to carry out the contract prior to the date of any actual default amount to such a breach? Was such conduct on the part of one party, if accepted by the other as a breach, equivalent to an act rendering the performance impossible, or creating a disability to perform? In all the preceding cases in which it had been held that there had been a breach before the time fixed for the commencement of performance, there had been some act done inconsistent with the contract. In Hochster *vs.* De la Tour there was no act, but in place

of it, a positive and unqualified refusal to carry out the contract. Was this within the reason of the rule of common law which recognized in certain cases the possibility of an anticipatory breach? This was the question for decision in that case, and this was the question argued by counsel. During the argument, the decision which was subsequently announced was foreshadowed by the remark of Mr. Justice Crompton. He said (page 685):—

> When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will "not go on with the contract, I will consent that it shall be at an end "from this time; but I will hold you liable for the damage I have sus- "tained, and I will proceed to make that damage as little as possible by "making the best use I can of my liberty."

In delivering the opinion of the court, Lord Campbell, after pointing out that at common law, as already established, there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, proceeded to hold that since the only question was whether a positive and unqualified refusal by one party to carry out the contract ought to be considered in the same category as such anticipatory acts, it was more reasonable to hold that it ought. He said:—

> But it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement incon-

sistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant at the time of his renunciation had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages; but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case.

The decision thus reached has never been departed from, and is now the settled law of England. As has already been said, this decision involved no violation of any principle of the common law, nor was it contrary to any of the precedents. It was no new departure to say that there could be an anticipatory breach, or to say that damages might be assessed as the result of such a breach in advance of the time fixed for performance. Both these doctrines were familiar. The question was really not so much one of legal principle as of commercial convenience, and the decision reached was in the line of a long series of decisions, both before and after the case, to the effect that it is better to suffer some inconvenience in the assessment of damages than to delay the bringing of actions or require numerous actions upon contracts. The real point, therefore, to be determined in consider-

ing the soundness of cases like Hochster *vs.* De la Tour is not whether they violate the common law, for it is clear they do not, but whether they are reasonable and in accordance with the development of the law as applied to the transactions of commerce. Viewed in this light, it is submitted the doctrine of Hochster *vs.* De la Tour commends itself as "inherently reasonable," to quote the expression applied to it by Judge Hare. Conceding that the party who makes the absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party is willing to accept this position, what is to be gained by delay in bringing suit, and why should there not be a speedy action and settlement with regard to the rights of the parties? The law does not favor delay or multiplicity of actions. On the contrary, the convenience of the parties, especially in commercial transactions, is best served by speed and simplicity. No good reason can be suggested for any difference in this respect between the case of an unqualified refusal to perform a contract prior to the date fixed for its commencement and the creation of a disability to perform. So far as the rights of the parties are concerned, it would seem to be immaterial whether the party says I cannot or I will not; whether he says I have put it out of my power to perform, or I gave you notice that I do not intend to perform, nor can any logical distinction be suggested between a refusal to perform future acts to be done under a contract in course of performance and a refusal to perform the whole contract made before the time for commencement of performance.

A few examples may serve to illustrate what is here contended for.

Suppose a man owning an antique statue, of which but one copy is in existence, makes a contract with another to furnish him with a plaster cast at the expiration of three months, and at the expiration of a week destroys the statue without taking the plaster cast. No one could contend, under the authorities, that this did not con-

stitute an immediate breach of the contract, or that an action could not be brought at once for such breach. Suppose, however, instead of destroying the original statue, the contracting party gave notice in absolute and unqualified terms that he would not make the plaster cast, and that he should treat the contract as at an end. Would it not be equally reasonable to allow the other party to treat this as a breach, and if so, what could be gained by delaying the time of bringing the action? Whether the action was brought before or after the expiration of the three months, it would still be brought upon the breach occurring, in the one instance above cited, by the destruction of the statue; in the other, by the refusal to perform; and there would seem to be no logical reason why, if the breach occurred before the end of the three months, the action could not be brought before that time.

Or take the case suggested by Erle, J., during the argument of Cort *vs.* Ambergate, &c., Railway Company, already cited, as follows:—

> Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board, but defendant wrote word that he could not furnish a cargo, must the ship be sent to return empty?

Lord Campbell's pithy remark upon this was:—

> If it were law, it would not be sense.

If, however, it was not necessary for the shipowner to send his ship, why should he be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract? Convenience and justice and common sense would all seem to be furthered by allowing the action to be brought at once.

Or, take an illustration afforded by the present case: Assuming that the ten separate papers called hop contracts were ten separate contracts made cotemporaneously by the parties, it would still be true that if the parties had

chosen, they could have written all of these contracts into one contract, upon one piece of paper and have made it in form what it was in substance: an agreement to supply hops for five years in certain installments. If this had been the form of the contract, the authorities are clear that when the default happened which actually happened in the present case, leaving two years' deliveries yet unfilled, an immediate action might have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the remaining two years. If, however, it is reasonable in such a case to allow a recovery, why not equally reasonable if the acts to be done in the future, and as to which there is an unqualified and positive refusal, are to be done in pursuance of so-called separate contracts, instead of in pursuance of one contract? There is no difference in the breach; there is no difference in the damage. There would be no difference in the method of trying the action or of assessing the damages. To say that in one case damages can be recovered in an immediate action, and that in the other case they can only be recovered in a series of actions strung along over a period of two years, would be to establish one of those artificial distinctions which merchants find it difficult to understand, and which are always to be avoided, unless required to preserve important legal principles.

SECOND.—THE DOCTRINE OF HOCHSTER vs. DE LA TOUR HAS BECOME THE SETTLED LAW OF ENGLAND AS APPLIED TO EXECUTORY CONTRACTS FOR THE MANUFACTURE OR SALE OF GOODS, AND HAS BEEN ALMOST UNIVERSALLY ACCEPTED BY THE COURTS OF THE UNITED STATES.

It is true that in the case of

Roper *vs.* Johnson, L. R. 8 C. P., 167-178,

Keating, J., speaks of Hochster *vs.* De la Tour as intro-

ducing a "novel doctrine," but the same judge in the course of his opinion says:—

> That case has been distinctly recognized on many subsequent occasions, and we must now assume it to be law.

And in the subsequent case of

Mersey Steel & Iron Co. *vs.* Naylor, L. R., 9 Ap. Cas., 434-443.

Lord Blackburn, speaking of the doctrine of Hochster *vs.* De la Tour, says:—

> That was settled in Hochster *vs.* De la Tour, in the Queen's Bench, and has never been doubted since, because there is a breach of the contract, although the time indicated in the contract has not arrived.

Whatever, therefore, may be the law on this side of the Atlantic, the doctrine that a positive refusal may amount to a breach of contract giving rise to an action before the time fixed for performance is now part of the common law of England, too firmly settled to be questioned.

It must be conceded, of course, that the law cannot be considered as settled in this country until this court has passed upon it, and that no authorities can be cited which are binding upon this court. It was said, however, by Mr. Justice Gray, delivering the opinion of this court in the case of

Norrington *vs.* Wright, 115 U. S., 188-206,

that

> A diversity in the law as administered on the two sides of the Atlantic concerning the interpretation and effect of commercial contracts of this kind is greatly to be deprecated.

And this remark is equally applicable to the question of what constitutes a breach, as it is to the interpretation of the contract. And it is also true that this court is always inclined, other things being equal, to preserve and not to disturb a doctrine which has become an accepted rule of law governing merchants in their transactions with each other.

Now, while it may be said with truth that the authorities in this country are not unanimous, and that the Supreme

Court of Massachusetts which has refused to follow Hochster *vs.* De la Tour, is a court whose opinion is entitled to the highest respect, it cannot be denied that the profession and the courts throughout the United States have very generally accepted the opinion in Hochster *vs.* De la Tour, and have treated the rule laid down in that case as an established principle of the common law. Some evidence of this may be found in the practical unanimity of the text writers; no distinction in this respect existing between the American and English authors, except that the latter frequently by a foot note or otherwise call attention to the Massachusetts decision as an exception to the general rule. The following citations may be quoted by way of illustration:—

A promisor, by absolutely putting it out of his power to fulfill a contract entered into by him, may make himself liable, without demand, from the time he thus incapacitates himself, even though the time for performance has not yet arrived. He may, for instance, expressly repudiate the contract, in which case he may be at once sued, though the other party, if electing to sue immediately for the repudiation, cannot afterwards insist on the performance. A party, also, disabling himself by selling to B. an estate he has agreed to convey next month to A., may be sued at once by A. And a party disabling himself from marriage to A. (to whom he is engaged), by marrying B., may be sued by A. without prior demand. It has also been held that on a contract to sell to the plaintiff all the starch manufactured by the defendant within a year, an action will lie immediately on a breach, without waiting for the expiration of a year. As will be hereafter seen, the delivery of goods may be conditioned on the supply of material by the other party, and so of a covenant to repair. "It may also be observed," to adopt the words of a learned Federal judge in 1882, "that in contracts for services, for mar-"riage, for deliveries of merchandise, if the principal, before the time "for performance arrives, renounces the contract, an immediate action "will lie."

Wharton "Law of Contracts," section 885*a* (1882).

Wrongful Rescinding—Refusal—One exercising the power, already spoken of, to rescind his contract without right—that is, declaring to the other party his intention not to abide by it—commits thereby a breach whereon the other may bring an immediate suit without demanding performance, which, by the terms of the contract, was to be in the future.

Bishop on the Law of Contracts, section 1428 (1887).

Breach by Renunciation Before Time Set for Performance.—The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time arrives; they have a right to the maintenance of the contractual relation up to that time as well as to a performance of the contract when due. Therefore, a renunciation or repudiation of the contract by one of the parties before the time for performance has come discharges the other, and if he so chooses, entitles him to sue at once for a breach.

Lawson on Contracts, section 440 (1893).

Before Performance is Due.—The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time for performance arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. It is therefore settled by the great weight of authority that the renunciation of a contract by one of the parties before the time for performance has come, does not discharge the other unless the latter chooses to regard it as a discharge. If he chooses, he may so regard it, and at once sue for the breach. The discharge is optional with him. In a leading case on this point the defendant had engaged the plaintiff to enter into his service, the employment to commence at a future day; but before that time arrived, he wrote the plaintiff that he should not require his services. The plaintiff at once sued for the breach of contract, though the time for performance had not arrived, and the court held that he was entitled to do so. It was said by the court that "Where there is "a contract to do an act on a future day, there is a relation constituted "between the parties in the meantime by the contract, and that they "impliedly promise that in the meantime neither will do anything to "the prejudice of the other inconsistent with that relation." * * *

Though the rule as stated above is almost universally recognized, the Massachusetts court has held that a renunciation before the time for performance has arrived does not amount to a breach; that to render a person liable "for breach of an executory personal contract, the other "party must show a refusal or neglect to perform at a time when and "under conditions such that he did or might be entitled to require per-"formance."

Clark on Contracts, page 645 (1894).

A contract may be broken in any one of three ways: A party to a contract (1) may renounce his liabilities under it; (2) may by his own act make it impossible that he should fulfill them; (3) may totally or partially fail to perform what he has promised.

* * * * * * * *

The parties to a contract which is wholly executory, have a right to something more than a performance of the contract when the time

arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to the performance of the contract when due.

The renunciation of a contract by one of the parties before the time for performance has come discharges the other, if he so chose, and entitles him at once to sue for a breach.

Hochster *vs.* De la Tour is the leading case upon this subject. A. engaged X. upon the 12th of April to enter his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May A. wrote to X. to inform him that he should not require his services. X. at once brought an action, although the time for the performance had not arrived. The court held that he was entitled to do so. "When there is a contract to do an act on "a future day, there is a relation constituted between the parties in the "meantime by the contract that they impliedly promise that in the mean-"time neither will do anything to the prejudice of the other inconsistent "with that relation."

It would seem needless to imply a promise in order to give the plaintiff a right of action. A contract is a contract from the time it is made, and not from the time that performance of it is due; if this is so, it is needless and clumsy to introduce into every contract an implied promise that up to a certain period of its existence it shall not be broken.

FOOT NOTE BY AMERICAN AUTHOR: This is the general rule in the United States. Windmuller *vs.* Pope, 107 N.Y., 674; Kurtz *vs.* Frank, 76 Ind., 594; Remy *vs.* Olds, 88 Cal., 537; Kadish *vs.* Young, 80 Ill., 170, *contra;* Daniels *vs.* Newton, 114 Mass., 530.

Anson on Contracts, 8th edition (1895), with American notes, page 290.

The great weight of judicial authority in the United States supports the rule thus stated by the text writers.

In New York the Court of Appeals in
Burtis *vs.* Thompson, 42 New York, 246,
while applying the doctrine of Hochster *vs.* De la Tour to the case in hand, did not commit themselves to the adoption of that rule in all cases. In the case of
Howard *vs.* Daly, 61 New York, 362,
the doctrine was thoroughly discussed and approved by the judge who delivered the opinion, although the other judges concurred in the result on other grounds without

expressing their opinion on this point. In the subsequent case, however, of

Windmuller *vs.* Pope, 107 New York, 674,

it was apparently adopted to its full extent by the Court of Appeals. In that case the opinion of the court below was as follows:—

We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. Dillon *vs.* Anderson, 43 N. Y., 231; Howard *vs.* Daly, 61 *Id.*, 362; Ferris *vs.* Spooner, 102 *Id.*, 12; Hochster *vs.* De la Tour, 2 El. & Bl., 678; Cort. *vs.* Ambergate, &c., Railway Co., 17 Ad. & El., 127; Crabtree *vs.* Messermoth, 19 Ia., 179; Benjamin on Sales, sections 567, 568.

The judgment was affirmed *per curiam* without opinion in the Court of Appeals.

In Pennsylvania the question first came before the courts in an action in the District Court of Philadelphia, the opinion being delivered by Judge Hare.

Mountjoy *vs.* Metzger, 12 Am. Law Reg., N. S., 442.

The discussion of the case by this eminent jurist is extremely interesting. In the course of his opinion, speaking of the repudiation of the contract, he says:—

It cannot be said that such a refusal is a mere declaration of intention as distinguished from an actual breach. It is no doubt true that the parties have the whole of the last twenty-four hours during which to perform the agreement. Hence a buyer to whom the goods are offered at noon, may require the vendor to keep them in readiness till night, to give him time to procure and pay the purchase money. But an unquali-

fied refusal on his part is an irreparable breach which leaves no room for a subsequent change of purpose. It is an implied authority to the vendor to dispose of the property to the best advantage and charge the purchaser with the difference.

At the end of the opinion, in speaking of the doctrine in Hochster *vs.* De la Tour, he adds:—

The doctrine may, therefore, be regarded as established in England, and from its intrinsic reasonableness will in all probability prevail in the United States.

This prophecy has since been literally fulfilled. Since that time the doctrine has been repeatedly approved by the Supreme Court of Pennsylvania.

In the case of

Zuck *vs.* McClure, 98 Penna., 541-545,

the court said:—

A mere notice of an intended breach is not of itself a breach of the contract. It may become so if accepted and acted on by the other party. If the defendants had accepted the plaintiff's notice of breach contained in their letter of November 19th and acted upon it, there would plainly have been a breach of the contract.

And in the later case of

Hocking *vs.* Hamilton, 158 Penna., 107,

the court again approved the rule. The facts of this latter case were that the defendant agreed to buy from plaintiff fifty thousand tons of coal, in monthly installments of about four thousand tons per month, at a certain price per ton, the contract being a severable contract, under the doctrine of Scott *vs.* Kittanning Coal Co., 89 Penna., 231. After a portion of the coal had been delivered, the defendant repudiated the contract. He subsequently sent various orders to plaintiff for coal, which were filled, and for some of which he paid. Plaintiff then brought suit for the amount due for the unpaid bills of coal, and also for the failure to accept the full amount of coal under the contract. The defendant defended on the ground that under the contract, if it was enforced, payment for the coal shipped under it would not be due until after the

commencement of the suit. The court sustained the recovery, saying:—

In appellee's statement of his demand, after his claim for damages, he adds one for the delivery of thirty-seven hundred and one and a fraction tons of coal in December, 1888. It is contended that under the contract the payment for this coal was not due until after the suit was brought. The Referee finds as a fact that the appellants notified appellee that in August, 1888, the contract was terminated, and this finding is sustained by the evidence. As the contract was thus terminated prior to the suit, the appellee's right of action to recover not only damages, but the price of coal subsequently furnished, accrued.

In Campbell *vs.* Gates, 10 Pa., 483, it was held that one party having by letter refused to go on with the performance of the contract, the right of action for damages then accrued to the other party. In Lovell *vs.* Ins. Co., 111 U. S., 264, it is said by Mr. Justice Bradley: "Where one party to an "executory contract prevents the performance of it, or puts it out of his "own power to perform it, the other party may regard it as terminated, "and demand whatever damage he has sustained thereby." And in Am. & Eng. Encyclopedia of Law, vol. III., page 904, it is stated: "If, "before the time for the performance of a contract has arrived, one "party announce to the other that he does not intend to perform his "promise, the latter may treat the contract as broken, and bring an ac"tion immediately against the former for the breach. It is not necessary "that he should postpone his suit until the time for performance has "arrived."

As the contract was that of appellants, and as, by their refusal to perform, appellee was entitled to recover, as the damages as found by the Master were warranted by the evidence, and as the right of action had accrued at the time when the suit was brought, this judgment is affirmed.

The courts of Maryland have approved the doctrine of Hochster *vs.* De la Tour in the case of

Dugan *vs.* Anderson, 36 Md., 567.

Miller, J., delivering the opinion of the court, said:—

The defendant's first prayer denies the right of the plaintiff to recover damages for the alleged refusal of the defendant to take the plaintiff into partnership on the first day of March, 1871, under the contract alleged and sought to be set up, because the action was instituted prior to that time. The proposition thus announced by the defendant's prayer is a denial of the law of Hochster *vs.* De la Tour, 20 Eng. L. & Eq. Rep., 157, and of the English cases that have followed and sanctioned that decision. * * * The principle of this decision in cases to which it has been held applicable is, that there is a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. It is said that the promisee has an inchoate right to the performance of

the bargain, which becomes complete when the time for performance has arrived. In the meantime, he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having thus been broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause for action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. It is obvious that such a course must tend to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events, materially lessen, the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been or would have been diminished.

In the case of

Hosmer *vs.* Wilson, 7 Mich., 294,

the Supreme Court of Michigan, Christiancy, J., delivering the opinion, said:—

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine when it should be completed was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light as respects the plaintiff's remedy as an absolute physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort *vs.* Ambergate Railway Company, 6 E. L. & Eq., 230; Derby *vs.* Johnson, 21 Vt., 21; Clark *vs.* Marsiglin, 1 Denio, 317; Hochster *vs.* De la Tour, 20 L. & Eq., 157.

In the case of

Crabtree *vs.* Messersmith, 19 Iowa, 179,

the Supreme Court of Iowa, Cole, J., delivering the opinion, said:—

The action was commenced on the twenty-third day of December, 1861. There was evidence introduced tending to show that by the terms of the original contract of sale the defendant had his option to pay for the machine in money or in grain, as he earned it with the machine, at any time by or before Christmas, 1861. The evidence also tended to show that the defendant had taken the machine back to plaintiffs and expressly renounced the contract of purchase under which he had taken possession of it, and left the State and did not return until after Christmas, 1861. The fourth instruction asked by the plaintiffs and given by the court was, in substance, that if the jury believed from the evidence that before this suit was commenced the defendant had declared that he would not retain or pay for the machine, and left the State without making provision for the payment, and did not return till after the time fixed for payment, that such acts were evidence tending to show an abandonment of the contract which would entitle the plaintiff to bring this suit before the expiration of the time fixed for the delivery of the grain. The defendant claiming that the suit was prematurely brought, relied thereon in the District Court as a defense to the action, and asked the court, in several instructions prepared by his counsel, which were refused, and which embraced the same idea in different phraseology, to instruct the jury that if this suit was commenced before the time had expired in which the defendant was to deliver the grain, then the plaintiff could not recover. The giving and refusing to give these respective instructions was not error. The rule of law is well settled, that if before the time of performance of the contract arrives the promisor expressly renounce the contract, the promisee may treat this as a breach of said contract, and may at once maintain an action in respect thereof. Chitty on Contr., 799; Hochster *vs.* De la Tour, 2 Ellis & B., 678; Avery *vs.* Bowden, 5 *Id.*, 714; Elderton *vs.* Emmons, 6 Com. B., 160; Bowdell *vs.* Parsons, 10 East., 359; Lamoreaux *vs.* Rolfe, 36 N. H., 33.

Followed in

McCormick *vs.* Basal, 46 Iowa, 235.

In the case of

Fox *vs.* Kitton, 19 Ill., 518,

the Supreme Court of Illinois, Breese, J., delivering the opinion, said:—

We are disposed to attach more importance under the circumstances of this case to the conduct and declarations of the defendant at Chicago

than his counsel seem to do, and are disposed to regard them as affording good grounds for prompt action on the part of the plaintiff and as conferring the right upon him of avoiding the contract altogether. The defendant had agreed for the season ensuing the nineteenth day of May to run the vessel in the Buffalo and Chicago trade, and pay over the net earnings as fast as earned to the plaintiff. His undertaking, it seems to us, is of that description, and falls under the class of cases to which we have been referred, where a party agreeing to do an act at a future day, and before that day arrives declares he will not keep his contract or do the act, that the other party may act on the declaration and bring the action before the day arrives. * * * We think the declarations of the defendant and his refusal at Chicago to accept the services of plaintiff's agent to procure a cargo for Buffalo, gave the plaintiff a right to consider the new contract as repudiated and justified him in taking possession.

Followed in

Follansbee *vs.* Adams, 86 Ill., 13.

And again approved, after elaborate consideration, and after reargument, in the recent case of

Lake Shore, &c., Ry. Co. *vs.* Richards, 152 Ill., 59 (38 N. E. Rep., 773),

in which case the court, Shope, J., delivering the opinion, said:—

Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or, by his act and conduct, shows that he has renounced it, and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that the determination has been reached, and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of contract. Kadish *vs.* Young, *supra*. As said by Bowen, L. J., in Johnstone *vs.* Milling, 16 Q. B. Div., 460; "Its real operation "appears to be to give the promisee the right of electing either to treat "the declaration as *brutum fulmen*, and holding fast to the contract to "wait till the time for its performance has arrived, or to act upon it, and "treat it as a final assertion by the promisor that he is no longer bound "by the contract, and a wrongful renunciation of the contractual relation

"into which he has entered. * * * If he does so elect, it becomes a "breach of contract, and he can recover upon it as such." Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating and the contractual relation ceases to exist, except for purposes of maintaining the action for the recovery of damages.

These views are amply sustained by numerous decided cases.

In the case of

Kurtz *vs.* Frank, 76 Ind., 594,

the Supreme Court of Indiana, Woods, J., delivering the opinion, said:—

* * * But if this were otherwise, and if by its terms the contract was not to have been performed until at a time subsequent to the commencement of the suit, yet if, before the suit was brought, the appellant had renounced the contract and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action. Burton *vs.* Thompson, 42 N. Y., 246; Holloway *vs.* Griffith, 32 Iowa, 409; Frost *vs.* Knight, L. R., 7 Exch., 111.

In the case of

Davis *vs.* Grand Rapids School Furniture Co., 24 S. E., 630,

the Supreme Court of West Virginia, Holt, J., delivering the opinion, said:—

Instruction No. 4 was in effect that if the contract was binding, then the defendant had until the fifteenth day of August, 1893, in which to comply with the same, and no right of action could accrue to the plaintiff until the time which defendant had in which to comply had fully expired. This was properly refused, for the defendant had notified plaintiff that they did not intend to comply at all, and plaintiff had a right to take them at their word and sue for whatever damage the plaintiff thereby sustained.

In the case of

Remy *vs.* Olds, 88 Cal., 537,

the Supreme Court of California, Fitzgerald, J., delivering the opinion, said:—

The complaint shows upon its face that the action was brought subsequent to the written notice of the repudiation of the contract by the defendants, when the plaintiff was not in default, and after he had removed from and vacated, and the defendants had entered upon and taken posses-

sion of the premises heretofore mentioned. This constituted such a breach as authorized the plaintiff to immediately sue, without waiting for the time to arrive for the performance of the other conditions.

It has not been thought worth while to cite cases from State courts not of last resort, except in the single instance of Mountjoy *vs.* Metzgar, which was referred to in the brief of plaintiff in error.

In the Federal Courts the question first came up in 1853, in the case of

Greenway *vs.* Gaither, Taney, 227 (10 Fed. Cases, 1180),

upon an application to Mr. Justice Taney, sitting in Circuit in Maryland, to seal a bill of exceptions two years after the time for sealing it had elapsed. The case had been tried two years before the decision of Hochster *vs.* De la Tour, and the decision of the Circuit Court was apparently contrary to the rule laid down in that case. The judge who tried the case had refused the bill of exceptions on the ground that it was applied for too late, and had subsequently died. Upon the application to Mr. Justice Taney he refused to seal the bill, partly on the ground that under the circumstances it was too late to seal the bill, and partly on the ground that the case of Hochster *vs.* De la Tour could only be applied to contracts of the special character involved in that case. This opinion was delivered before Hochster *vs.* De la Tour had been approved, and followed in the subsequent cases, and before its rule had become settled as part of the common law.

In the subsequent Federal cases, with a single exception, the Federal judges have, like the judges of the State courts, adopted the rule in its broad construction.

The next case was the case of

Hancock *vs.* The N. Y. Life Ins. Co., 13 Am. Law Reg., N. S., 103 (11 Fed. Cases, 402).

This was a suit against a life insurance company, which, during the life of the person insured, repudiated the con-

tract. The case was tried in the Circuit Court for the Eastern District of Virginia, before Bond, Circ. J. The plaintiff's counsel contended that under the doctrine of Hochster *vs.* De la Tour, the plaintiff was entitled to a recovery. The court sustained this ruling, and a verdict was rendered for the plaintiff.

The next case was the case of

Grau *vs.* McVicker, 8 Biss., 13 (10 Fed. Cases, 996).

In that case Drummond, Circ. J., said:—

I think that the principles decided in the case of Hochster *vs.* De la Tour, reported in 20 Eng. Law & Eq., 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other, and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant on the continent of Europe for a time, commencing on the 1st of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract; in other words, that he did not want him as a courier. Thereupon, before the 1st of June, the plaintiff commenced an action against the defendant and recovered, and the question came up before the Court of Queen's Bench whether the action, under such circumstances, could be maintained. And the unanimous opinion of the court was that the action was maintainable, and on the ground that although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the 1st of June, or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete, and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there would be just as much reason to say that the action could not be maintained until the 1st of September as that the action could not be maintained for a breach prior to 1st of June, because there were three months during which the service was to be performed, and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases, where contracts run for years, and it would be unreasonable in such a case to require a party to

wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward, or may arise in consequence of the time not having come or not having expired should be considered in estimating the damages.

The next case was the case of

Dingley *vs.* Oler, 11 Fed. Rep., 372,

in which the question came before the Circuit Court for the District of Maine. The opinion of the court, approving and applying the doctrine of Hochster *vs.* De la Tour, was delivered by Lowell, Circ. J. In the course of that opinion he says:—

The defendants have unqualifiedly refused to ship the ice; this action may be maintained, though brought before the close of the season, if the doctrine of Hochster *vs.* De la Tour, 2 Ell. & Bl., 678, is to be followed. That doctrine is that in contracts for services, for marriage, for deliveries of merchandise, if the principal, before the time for performance arrives, renounces the contract, an immediate action will lie. Frost *vs.* Knight, L. R., 7 Ex., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Crabtree *vs.* Messersmith, 19 Iowa, 179; Halloway *vs.* Griffith, 32 Iowa, 409; Fox *vs.* Kitton, 19 Ill., 519; Burtis *vs.* Thompson, 42 N. Y., 246; Howard *vs.* Daley, 61 N. Y., 362. These cases seem to me to be founded in good sense and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic.

The judgment in this case was reversed in

Dingley *vs.* Oler, 117 U. S., 490,

but upon other grounds, the Supreme Court declining to express an opinion as to the doctrine of Hochster *vs.* De la Tour.

In the case of

Foss Schneider Brewing Co. *vs.* Bullock (16 U. S. Appeals, 311), 59 Fed. Rep., 83,

Taft, Circ. J., in delivering the opinion of the Circuit Court of Appeals, said:—

It is true that where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other contracting party may accept this as an anticipatory breach of the contract and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms; but, in order to enable the latter to sue on such an anticipatory breach, he must accept it as such and consider the contract at an end.

In the case of

Edward Hines Lumber Co. *vs.* Alley (43 U. S. Appeals, 1609), 73 Fed. Rep., 603,

the Court of Appeals for the Sixth Circuit recognized the doctrine of Hochster *vs.* De la Tour as in force. In that case there was a contract to manufacture and sell lumber, and to pay for it in installments within sixty days after portions of it were piled. The suit was brought within less than sixty days after the piling of the whole lumber, and the question was whether there had been a repudiation of the contract by the defendant prior to the time for performance. The Court of Appeals held that the Circuit Court properly instructed the jury:—

> That as a matter of law, the plaintiff in error by its letter of September 1st, had renounced the contract and had refused performance absolutely and unconditionally, and had therefore breached their agreement to receive not only the installment it was asked to receive at the time, but had committed a breach of the entire contract.

In the very recent case of

Marks *vs.* Van Eeghen (57 U. S. Appeals, 1491), 85 Fed. Rep., 853,

decided by the Circuit Court of Appeals for the Second Circuit, the court (Wallace, Circ. J.), delivering the opinion, said:—

> It was decided in Daniels *vs.* Newton, 114 Mass., 530, that the action does not lie before the expiration of the time of performance, and recently that case was followed in Clark *vs.* Casualty Co., 67 Fed., 222. The question has never been decided by the Supreme Court of the United States, and the observations in the opinions in Smoot's Case, 15 Wall., 36, and Dingley *vs.* Oler, 117 U. S., 490, 6 Sup. Ct., 850, were *obiter*. In view of the overwhelming preponderance of adjudication, we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed, he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing; and if he does not do so, his right of action for a breach can only rest upon the refusal of the other party to perform the existing contract according to its terms. The action cannot be maintained when the evidence to prove a renunciation of

the contract is equivocal or indeterminate. It is enough, however, if it appears that he has distinctly signified his intention to repudiate the contract. The English authorities in support of these propositions, beginning with the leading cases of Hochster *vs.* De la Tour, 2 El. & Bl., 678, are unanimous. Frost *vs.* Knight, L. R., 7 Exch., 111; Roper *vs.* Johnson, L. R., 8 C. P., 167; Johnstone *vs.* Milling, 16 Q. B. Div., 460. The doctrine of these authorities has been adopted and approved by the courts of this country in numerous adjudications. Brewing Co. *vs.* Bullock, 8 C. C. A., 14, 59 Fed., 83; Howard *vs.* Daly, 61 N. Y., 362; Ferris *vs.* Spooner, 102 N. Y., 10, 5 N. E., 773; Windmuller *vs.* Pope, 107 N. Y., 674, 14 N. E., 436; Nichols *vs.* Steel Co., 137 N. Y., 471, 33 N. E., 561; Fox *vs.* Kitton, 19 Ill., 519; Engesette *vs.* McGilvray, 63 Ill. App., 461; Railway Co. *vs.* Richards, 152 Ill., 59, 38 N. E., 773; Crabtree *vs.* Messersmith, 19 Iowa, 179; Holloway *vs.* Griffith, 32 Iowa, 409; McCormick *vs.* Basal, 46 Iowa, 235; Platt *vs.* Brand, 26 Mich., 173; Slors Co. *vs.* Smith, 11 Ohio, 312; Kalkhoff *vs.* Nelson, 60 Minn., 284-287, 62 N. W., 332; Davis *vs.* Furniture Co., 41 W. Va., 717, 24 S. E., 630.

In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of their action.

Against this current of authority there are in all four cases, two in the Federal courts and two in the State courts. One of them is the case of Greenway *vs.* Gaither, already cited. The other three are

Clark *vs.* National, &c., Co., 67 Fed. Rep., 222;
Daniels *vs.* Newton, 114 Mass., 530;
Stanford *vs.* McGill, 6 N. Dakota Reps., 536.

Of these, the case of Clark *vs.* the National, &c., Company, was a decision by a single judge on a motion for a new trial, and was based upon the decision in Daniels *vs.* Newton, and upon an assumption, which, it is submitted, was without warrant, that the opinion of the Supreme Court of the United States in Dingley *vs.* Oler, 117 U. S., 490, showed the disposition of that court to be strongly in sympathy with the views of the Supreme Court of Massachusetts.

The opinion in the North Dakota case of Stanford *vs.* McGill is an elaborate attempt to demonstrate that the general acceptance of the rule of Hochster *vs.* De la Tour in the United States rests rather upon a series *of dicta*

than upon decisions where the actual point was necessarily involved. So far as the court deals with the underlying principles, its reasoning goes too far, since it even intimates a doubt whether a refusal to perform amounts to a breach in cases where the time for the performance by the other party has arrived, a rule thoroughly established even in Massachusetts, which rejects the doctrine of Hochster *vs.* De la Tour.

The only important case of the four above mentioned is the Massachusetts case of

Daniels *vs.* Newton, 114 Mass., 530,

the opinion in which is generally cited as containing all that can be said in opposition to the decision of Hochster *vs.* De la Tour. A careful examination of the opinion will show that it rests upon two propositions, viz.:—

1. That until the time of performance arrives neither contracting party can suffer any injury which can form a ground of damages.

2. That the adoption of the rule of Hochster *vs.* De la Tour in cases of ordinary contracts would necessitate its adoption in the case of commercial paper.

Judge Wells, in his opinion, does not deny the advantage and convenience to the commercial world of applying the same rule of anticipatory breach to cases of renunciation of a contract before the time of performance as is applied to the renunciation of the remaining unmatured obligations of a contract while it is in course of performance, and in fact there can be no distinction on this point between the two classes. He rests his opinion wholly on the two propositions above mentioned.

As to the first proposition, viz.: That until the time for performance arrives neither contracting party can

suffer any injury which can form a ground of damages. Judge Wells, says (page 533):—

"An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives when by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right nor loss upon which to found an action.

And again at the close of the opinion (page 541):—

The plaintiff could require nothing of them until the expiration of that time, and no conduct on their part, or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale.

If this is true—if there cannot be a violation of right before the time fixed for performance—if no conduct of either party before that time can amount to a breach, then Hochster *vs.* De la Tour is not good law; but the statement is far from correct. There are many cases in which before the time fixed for performance one of the contracting parties may do that which amounts to a breach and forms a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the latter a cause of action for breach of the contract, and this is common sense as well as good law. If the reasoning in Daniels *vs.* Newton is sound, it is authority not only for the proposition that a contract cannot be broken by deliberate renunciation, but that it cannot be broken by an act which renders its performance impossible. There is no rule of law that a contract cannot be broken before the time fixed for performance, and this being so, the question is not whether there can be such a breach, but whether it is reasonable to construe an absolute renunciation of the contract as such a breach.

With regard to the second proposition, viz.: That to adopt the rule of Hochster *vs.* De la Tour necessitates its application to commercial paper, it may be said that this reasoning also proves too much, since it would be equally

fatal to the rule now well established, that after the time for the commencement of performance of a contract involving a series of acts, there may be an anticipatory breach of the whole series long before the time of maturity. For example, an executory contract for the sale and delivery of goods by installments may be broken as soon as the first is due, and damages recovered for the entire contract. Yet the courts have not found it necessary to extend this rule to the case of a note for the payment of money in installments. In the latter case, unless there is an express stipulation in the note, the default in the payment of one installment does not give rise to an action for the entire principal. Neither would the adoption of the rule of Hochster *vs.* De la Tour require the courts to apply the same rule to the case of an ordinary promissory note.

The truth is that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on an entirely different footing from executory contracts for the purchase and sale of goods. In the case of an ordinary money contract, such as a promissory note or a bond, the consideration has passed. There are no *mutual* obligations, and as these cases do not fall within the reason of the rule of Hochster *vs.* De la Tour they have been universally excluded.

The distinction is well expressed by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in

Nichols *vs.* The Scranton Steel Co., 137 N. Y., 471-487,

as follows:—

> It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and obligations interdependent. In such case, and where one party is bound, from time to time, as expressed to deliver part of an aggregate and specified amount of property to another

who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract, or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing, to recover damages which the other may sustain by reason of this refusal.

It may be added with regard to Daniels *vs.* Newton that it is certainly contrary to the spirit both of the earlier and later Massachusetts decisions, if, indeed, it is not directly opposed to them. Reference need only be made to the cases of

Newcomb *vs.* Brackett, 16 Mass., 161;
Heard *vs.* Bowers, 23 Pick., 455;
Parker *vs.* Russell, 133 Mass., 74;
Whitten *vs.* New Eng. Ins. Co., 165 Mass., 343.

The result of the authorities in Great Britain and the United States may be summed up as follows:—

IN THE CASE OF A CONTRACT EXECUTORY ON BOTH SIDES—A PROMISE FOR A PROMISE—IF ONE PARTY BEFORE OR DURING PERFORMANCE WITHDRAWS HIS PROMISE, EITHER EXPRESSLY BY RENUNCIATION OR IMPLIEDLY BY AN ACT PREVENTING PERFORMANCE, THE OTHER PARTY MAY ALSO WITHDRAW HIS PROMISE, AND THE CONTRACT IS TERMINATED; BUT IN SUCH CASE, AS IT HAS COME TO AN END, NOT IN DUE COURSE BY PERFORMANCE, BUT THROUGH THE WRONGFUL ACT OF ONE PARTY, THE INJURED PARTY MAY SUE THE WRONGDOER FOR THE BREAKING OF IT.

THIRD.—THE SUPREME COURT OF THE UNITED STATES, WHILE IT HAS NEVER PASSED UPON THE QUESTION, HAS REPEATEDLY ADOPTED AND APPLIED THE PRINCIPLES UPON WHICH THE RULING OF HOCHSTER vs. DE LA TOUR IS FOUNDED.

In the case of

Smoot's Case, 15 Wallace, 36,

this court (Mr. Justice Miller delivering the opinion of the court) made the following reference to the case of Hochster *vs.* De la Tour:—

In the case of Phillpotts *vs.* Evans, 5 Meeson & Welsby, 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of wheat at the time of the notice or at the time of the tender. Baron Park said: "I think no action would have lain for the breach of the "contract at the time of the notice, but that plaintiff was bound to wait "until the time of delivery to see whether the defendant would then re-"ceive it. The defendant might have chosen to take it and would have "been guilty of no breach of contract. His contract was not broken by "his previous declaration that he would not accept."

And though some of the judges in the subsequent case of Hochster *vs.* De La Tour, 2 Ellis and Blackburn, 678, disapprove very properly of the extreme ground taken by Baron Park, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff.

In the case of

United States *vs.* Behan, 110 U. S., 338, 346,

this court (Mr. Justice Bradley delivering the opinion) said:—

It is to be observed that when it is said in some of the books, that where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained.

In the case of

Lovell *vs.* St. Louis Mutual Life Ins. Co., 111 U. S., 264,

a life insurance company terminated its business and transferred its assets and policies to another company, and the court held that this in itself constituted a breach of

contract for which the insured might sue, although the time for the performance of the obligations of the insurance company, to wit, the death of the insured, had not arrived. This court (Mr. Justice Bradley delivering the opinion) said:—

Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby. We had occasion to examine this subject in the recent case of United States *vs.* Behan, 110 U. S., 339, to which we refer. It is unnecessary to discuss it further here.

In the case of

Hinckley *vs.* Pittsburgh Steel Co., 121 U. S., 264, there was a contract by the defendant to purchase from the plaintiff rails to be rolled by the latter, and to be drilled as might be directed. The defendant refused to give directions for drilling, and at his request plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then defendant advised the plaintiff that he should decline to take any rails under the contract. It was held that the plaintiff was not bound to roll the rails and tender them, and that his damages were not the difference between the contract and market price, but the difference between the contract price and the cost of manufacture. This court (Mr. Justice Blatchford delivering the opinion) said:—

The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the

rule of damages applicable to the case of the refusal of a purchaser to take an existing article, is not applicable to a case like the present. The proposition that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the six thousand tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

In the case of

Anvil Mining Co. *vs.* Humble, 153 U. S., 540,

it was held that conduct of one party to the contract which hindered and prevented the other party from performing it not only relieved the other party from performance on his part, but in itself amounted to a breach of the contract entitling the other party to entire damages therefor. The rule is thus clearly stated in the opinion of the court below by Mr. Justice Brewer, as follows:—

It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong-doing of the other party has brought about.

In the case of

Pierce *vs.* Tennessee, &c., R. R. Co., 173 U. S., 1,

this court held that on discharge from a contract of employment, the party discharged might elect to treat the contract as absolutely and finally broken, and in an action recover the full value of the contract to him at the time of the breach, including all that he would have received in the future, as well as in the past, deducting any sum that he might have earned, or might thereafter earn. In the opinion of Mr. Justice Gray it is said:—

> But the recent tendency of judicial decisions in this country in actions of contract, as well as in actions of tort, has been towards allowing entire damages to be recovered, once for all, in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation.

And further on (page 16):—

> The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into his service; or to resort to successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representative after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract.

Other cases might be cited, but these are sufficient to show that this court has fully adopted the principles:—

First.—That where a party abandons a contract and puts it out of his power to perform it, an immediate right of action is given, irrespective of the time fixed for performance.

Second.—That in the case of a refusal to carry out a contract, the refusal is in itself a breach, and the damages are recovered for that breach, and not for the subsequent failure of the party to carry out the stipulations of the contract at the time appointed; and

Third.—That where it can be done, a party to a contract injured by the wrongful repudiation of the contract by the other, will be allowed to recover his entire damages once for all in a single action.

It is submitted that these principles are the foundation stones of the doctrine of Hochster *vs.* De la Tour. As soon as it is conceded that the acts or the declarations of one party to a contract which amount to an entire repudiation of the contract itself may in themselves constitute a breach, and do not merely excuse the other party from performance, it logically follows that an action may be maintained for such a breach, and this would be true whether the acts or declarations take place before the time for commencement of performance of the entire contract or merely before the time fixed for the performance of the portion of the contract remaining unperformed. In either case the action is for damages, not because the party broke his

contract by not doing the thing he promised at the time appointed, but because he broke his contract by wrongfully repudiating or preventing its performance before that time arrived. And if the renunciation of the unperformed and unmatured obligations of a contract in course of performance is in itself an immediate breach as to those obligations, giving rise to an action with a special measure of damages, it would seem to follow that the renunciation of the entire contract before the time fixed for commencement of performance is also a breach giving rise to a like action with a like measure of damages.

How close is the reasoning of this court in the cases cited, to the reasoning which led to the decision in Hochster *vs.* De la Tour may be seen by a comparison of the language of Mr. Justice Brewer in Anvil Mining Co. *vs.* Humble, with the language of Mr. Justice Crompton in Hochster *vs.* De la Tour.

Mr. Justice Brewer said:—

> Whenever one party is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words he may abandon it and recover as damages the profits he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.

Mr. Justice Crompton said:—

> When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end, as if it had never been. But I am inclined to think that the party may also say "since you have announced that you will not "go on with the contract, I will consent that it shall be at an end from "this time, but I will hold you liable for the damage I have sustained."

With regard to the question of damages discussed in the brief of the plaintiff in error, little need be said in addition to what has been said by the court below. The plaintiff in error's real contention is that the only measure of damages was the difference between the contract price and the market price at the place of delivery. This point

really rests upon the plaintiff in error's other proposition, that the action was premature. All the argument made by plaintiff in error as to the inconvenience and injustice of assessing damages in advance of the time fixed for performance applies just as much to actions on executory contracts, broken during the course of performance, as to actions upon executory contracts broken before the time for performance commences. If, either in the case of an executory contract repudiated during performance, or an executory contract repudiated prior to any performance, suit can only be commenced after the expiration of the time for complete performance, then the measure of damages is the difference between the contract price and the market price at the date of delivery. If, however, in either case suit may be brought before the time for complete performance, then the plaintiff in error's proposition is not correct if its meaning is that the court must wait until the date of complete performance before estimating the damages. If a suit may be commenced before the time for complete performance, it may, of course, be tried before that time, and in such cases it would be impossible to obtain in advance market quotations for a future date. The rule in such cases is to give to the plaintiff compensation based, as far as possible, upon the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

In the ordinary contract for the sale of goods not specific, the loss is the profit which the seller would have made. This is usually measured by the difference between the contract price and the market value at the date of delivery, because:—

First.—If the vendor did not purchase the goods until the date of delivery, his profit would be the difference between the contract price and the market price at that date.

Second.—If the vendor purchased the goods prior to

the date of delivery, he could sell them at the date of delivery for the market price, and hence the measure of damages remains the same.

The rule as to market price, however, is not an arbitrary rule, but only applies in such cases because it is necessarily the best measure of the plaintiff's loss. Where, however, before the entire completion of the contract the vendee repudiates it, the damage must necessarily be ascertained in other ways. If the vendor was to manufacture the goods, and in the process of manufacture the contract is repudiated, he is not bound to complete the manufacture and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance.

Hinckley *vs.* Pittsburgh, &c., Co., 121 U. S., 264.

It is, of course, obvious that in such cases the manufacturer may actually obtain his profit before the time fixed for performance, and may recover on a basis of cost which might have been increased or diminished by subsequent events, but the party who broke the contract before the time for complete performance cannot complain, and takes the risk of loss of profit by such anticipation of the time.

If the vendor has to buy instead of to manufacture, the same principle prevails. He need not keep the goods on hand, or subsequently buy goods to fill the contract. He can show what was the value of the contract by showing for what price he could have made subcontracts, this price corresponding to the cost of manufacture in the case of a manufacturer. He, too, may receive his money earlier in this way, and may gain or lose by the estimation of his damage in advance of the time for performance, but, as was said by Mr. Justice Brewer, he has the right to accept the situation tendered to him, and the other party cannot complain.

The case of

Roper *vs.* Johnson, L. R., 8 C. P., 167,

cited by plaintiff in error, is not inconsistent with this view.

In that case it was held that the plaintiff was not precluded from recovering damages because he did not or could not show that he could have made a forward subcontract. Grove, J., says:—

> If there had been any materials here to show that at the time of the breach the plaintiffs could, without extraordinary trouble, have entered into a forward contract at the then market price, the jury might have taken them into consideration in mitigation of the damages.

The principle adopted by the court below was applied and elucidated by Mr. Justice Peckham in delivering the opinion of the Court of Appeals of New York in the case of

Nichols *vs.* The Scranton Steel Company, 137 N. Y., 471-487,

as follows:—

> We hold, however, that by the repudiation the plaintiff is absolved from the further delivery of iron under t[illegible]ntract, and that an action to recover damages arising from defendant's refusal to receive and pay for such iron may be at once commenced. We do not think the fact that some iron had been delivered, the time for the payment of which had not, by the terms of the contract, arrived when the suit was commenced, makes any difference.
>
> If it were not for a repudiation of the contract nothing could be recovered as damages for the iron not delivered, because by the terms of the contract such delivery and payment would not be due; but when the defendant does repudiate the contract, and refuse on its part to fulfill its terms, it cannot be heard to say that the other party must himself be bound by it, and must await the expiration of the term of credit provided for by it before any action can be maintained under it. The plaintiff does not recover the moneys as being the contract price strictly and technically, but as damages for the breach of the contract by the defendant. And those damages would be the present worth of the moneys payable under the contract at the time therein provided. Thus, if the moneys were to be due at the end of four months from the time when the iron was, by the terms of the contract, to be delivered, the measure of damages would be, in such case, the present worth of an obligation to pay money due at such a certain time.

For these reasons it is submitted that the court below committed no error, and that the judgment should be affirmed.

FRANK P. PRICHARD,
JOHN A. GARVER,
For Defendants in Error.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1899.

ROEHM *v.* HORST.

CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 188. Argued March 15, 16, 1900. — Decided May 14, 1900.

After a careful review of all the cases, American and English, relating to anticipatory breaches of an executory contract, by a refusal on the part of one party to it to perform it, the court holds that the rule laid down in *Hochster* v. *De la Tour*, 2 El. & Bl. 678, is a reasonable and proper rule to be applied in this case.

That rule is that after the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it; but that an option should be allowed to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option.

The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due.

As to the question of damages, when the action is not premature, the plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself.

THIS was an action for breach of four certain contracts, brought

by Paul R. G. Horst and others against John Roehm in the Circuit Court of the United States for the Eastern District of Pennsylvania, in January, 1897, and was tried under a stipulation, waiving a jury, before Dallas, Circuit Judge, who made a special finding of facts, and, on the facts so found, gave judgment for plaintiffs. 84 Fed. Rep. 565. The case was carried by defendant to the Circuit Court of Appeals for the Third Circuit, and the judgment of the Circuit Court was affirmed. 62 U. S. App. 520. Thereupon Roehm applied to this court for a writ of certiorari, which was granted, and the cause subsequently heard here.

The Circuit Court found that —

"On August 25th, 1893, the firm of Horst Brothers, composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, the legal plaintiffs, entered into four written contracts with John Roehm, the defendant, of which the following are copies:

"'*Hop Contract.*

"'Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

"'Witnesseth: That the said parties of the first part agree to sell and deliver to the party of the second part, and that the party of the second part agrees to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

"'Time of shipment, 20 bales each month, October, November, December, January and February, except as hereafter provided.

"'If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted,

and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within thirty days after receipt of written notice of such decision, submit samples or tender delivery to the party of the second part, other hops, in fulfillment of this agreement, and party of the second part agrees to receive same.

"'In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

"'Horst Bros.

"'John Roehm.'"

[Here followed a second, third and fourth contract, of same tenor and under same date, the second for one hundred bales of the crop of 1896, to be shipped twenty bales each month, in the months of March, April, May, June and July; the third for one hundred bales of the crop of 1897, to be shipped, twenty bales each month, in the months of October, November, December, January and February; and the fourth for one hundred bales of the crop of 1897, to be shipped twenty bales each month, in the months of March, April, May, June, and July.]

"The months named in each of these contracts respectively, as 'time of shipment,' must, under the custom of the trade, be understood as meaning the month so named, which would follow next after the summer months of the year of the crop referred to in the particular contract.

"On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst in the said contracts.

"Upon June 23d, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"'June 23, 1896.

"'Dear Sir: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

"'Respectfully yours,

"'Horst Brothers.'

"To this, under date of June 27th, 1896, the defendant replied, saying: . . . 'I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, . . . which, of course, you cannot fulfill. I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts.' In answer to this, Horst Brothers in liquidation addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Brothers; and in which it was further stated that, 'so far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you.' This communication was not replied to.

"In October, 1896, the first shipment of twenty bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who, on October 24, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27, 1896, declined to receive the hops.

"At the time of the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for 'prime Pacific Coast hops of the crop of 1896,' and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the contracts sued on and these above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows."

[Here followed the computation resulting in the amount for which judgment was rendered.]

The opinion of the Circuit Court of Appeals stated the case thus:

Statement of the Case.

"In August, 1893, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation, and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date: are similar as regards the quantity of hops to be delivered, and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract cancelled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm, as follows:

"'Dear Sir: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"'Very truly,

"'Horst Brothers.'"

"To this letter Roehm replied, under date of September 14, 1896:

"'Dear Sirs: In response to your letters dated 3d & 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"'Very truly,

"'JOHN ROEHM.'

"On October 9, 1896, Horst Brothers advised Roehm of twenty bales of hops per October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"'Gentlemen: Yours of October 9, enclosing bill of lading and bill of particulars per twenty bales of hops forwarded me under the terms of contract of August 23, 1893, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"'Very truly yours,

"'JOHN ROEHM.'

"No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this suit was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs."

The contention that Roehm was entitled to treat the contract as determined by the retirement of one of the members of the

firm of Horst Brothers, and the assignment of his interest to his copartners, was not renewed in this court.

Mr. Samuel Dickson for Roehm. *Mr. R. O. Moon* and *Mr. Richard C. Dale* were on his brief.

Mr. Frank P. Prichard for Horst and others. *Mr. John A. Garver* was on his brief.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

It is conceded that the contracts set out in the finding of facts were four of ten simultaneous contracts, for one hundred bales each, covering the furnishing of one thousand bales of hops during a period of five years, of which six hundred bales had been delivered and paid for. If the transaction could be treated as amounting to a single contract for one thousand bales, the breach alleged would have occurred while the contract was in the course of performance; but plaintiffs' declaration or statement of demand averred the execution of the four contracts, "two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897," set them out *in extenso*, and claimed recovery for breach thereof, and in this view of the case, while as to the first of the four contracts, the time to commence performance had arrived, and the October shipment had been tendered and refused, the breach as to the other three contracts was the refusal to perform before the time for performance had arrived.

The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all

liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is, therefore, presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it, has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes to *Cutter* v. *Powell*, 2 Smith's Leading Cases, 1212, 1220, 9th edition by Richard Henn Collins and Arbuthnot. Some of these, though quite familiar, may well be referred to.

In *Hochster* v. *De la Tour*, 2 El. & Bl. 678, plaintiff, in April, 1852, had agreed to serve defendant, and defendant had undertaken to employ plaintiff, as courier, for three months from June first, on certain terms. On the eleventh of May, defendant wrote plaintiff that he had changed his mind, and declined to avail himself of plaintiff's services. Thereupon, and on May twenty-second, plaintiff brought an action at law for breach of contract in that defendant, before the said first of June, though plaintiff was always ready and willing to perform, refused to engage plaintiff or perform his promise, and then wrongfully exonerated plaintiff from the performance of the agreement, to his damage. And it was ruled that as there could be a breach of contract before the time fixed for performance, a positive and

absolute refusal to carry out the contract prior to the date of actual default amounted to such a breach.

In the course of the argument, Mr. Justice Crompton observed: "When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. The word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty.'"

In delivering the opinion of the court, (Campbell, C. J., Coleridge, Erle and Crompton, JJ.), Lord Campbell, after pointing out that at common law there were numerous cases in which an anticipatory act, such as an act rendering the contract impossible of performance, or disabling the party from performing it, would constitute a breach giving an immediate right of action, laid it down that a positive and unqualified refusal by one party to carry out the contract should be treated as belonging to the same category as such anticipatory acts, and said, p. 690:

"But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is

prejudiced by putting faith in the defendant's assertion; and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July and August, 1852; according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages: but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case."

In *Frost* v. *Knight*, L. R. 7 Ex. 111, defendant had promised to marry plaintiff so soon as his (defendant's) father should die. While his father was yet alive he absolutely refused to marry plaintiff, and it was held in the Exchequer Chamber, overruling the decision of the Court of Exchequer, L. R. 5 Ex. 322, that for this breach an action was well brought during the father's lifetime. Cockburn, C. J., said: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention

not to perform it, as established by the cases of *Hochster* v. *De la Tour*, 2 E. & B. 678, and the *Danube & Black Sea Company* v. *Xenos*, 13 C. B. (N. S.) 825, on the one hand, and *Avery* v. *Bowden*, 5 E. & B. 714, *Reid* v. *Hoskins*, 6 E. & B. 953, and *Barwick* v. *Buba*, 2 C. B. (N. S.) 563, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

The case of *Danube Company* v. *Xenos*, 11 C. B. (N. S.) 152, is stated in the headnotes thus: On the 9th of July, A, by his agent, agreed to receive certain goods of B on board his ship to be carried to a foreign port, — the shipment to commence on the 1st of August. On the 21st of July A wrote to B, stating that he did not hold himself responsible for the contract, the agent having no authority to make it; and on the 23d he wrote again offering a substituted contract, but still repudiating the original contract. B by his attorneys gave A notice that he should hold him bound by the original contract, and that, if he persisted in refusing to perform it, he (B) should forthwith proceed to make other arrangements for forwarding the goods to their destination, and look to him for any loss. On the 1st of August, A again wrote to B, stating that he was then prepared to receive the goods on board his ship, making no allusion to

the original contract. B had, however, in the meantime entered into a negotiation with one S for the conveyance of the goods by another ship, which negotiation ended in a contract for that purpose with S on the 2d of August. B thereupon sued A for refusing to receive the goods pursuant to his contract; and A brought a cross action against B for refusing to ship. Upon a special case stating these facts: Held, that it was competent to A to treat B's renunciation as a breach of the contract; and that the fact of such renunciation afforded a good answer to the cross action of A, and sustained B's plea that before breach A discharged him from the performance of the agreement.

Erle, C. J., said (p. 175): "In *Cort* v. *Ambergate Railway Company*, 17 Q. B. 127, it was held, that, upon the company giving notice to Mr. Cort that they would not receive any more of his chairs, he might abstain from manufacturing them, and sue the company for the breach of contract without tendering the goods for their acceptance. So, in *Hochster* v. *De la Tour*, 2 El. & Bl. 678, it was held that the courier whose services were engaged for a period to commence from a future day, being told before that day that they would not be accepted, was at liberty to treat that as a complete breach, and to hire himself to another party. And the boundary is equally well ascertained on the other side. Thus, in *Avery* v. *Bowden*, 5 El. & Bl. 714; 6 El. & Bl. 953, where the agent of the charterer intimated to the captain, that, in consequence of the breaking out of the war, he would be unable to furnish him with a cargo, and wished the captain to sail away, and the latter did not do so, it was held not to fall within the principle already adverted to, and not to amount to a breach or renunciation of the contract. But where there is an explicit declaration by the one party of his intention not to perform the contract on his part, which is accepted by the other as a breach of the contract, that beyond all doubt affords a cause of action."

The case was heard on error in the Exchequer Chamber before Cockburn, C. J., Pollock, C. B., Wightman, J., Crompton, J., Channel, B., and Wilde, B; and the judgment of the Common Pleas was unanimously affirmed. 13 C. B. (N. S.) 825.

In *Johnstone* v. *Milling*, 16 Q. B. Div. 467, Lord Esher, Mas-

ter of the Rolls, puts the principle thus: "When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."

Lord Justice Bowen said (p. 472): "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for a breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such."

The doctrine which thus obtains in England has been almost universally accepted by the courts of this country, although the precise point has not been ruled by this court.

In *Smoot's Case*, 15 Wall. 36, 48, Mr. Justice Miller observed: "In the case of *Philpotts* v. *Evans*, 5 M. & W. 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of the wheat at the time of the notice or at the time of the tender. Baron Parke said: 'I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept.' And though some of the judges in the subsequent case of *Hochster* v. *De la Tour*, 2 El. & Bl. 678, disapprove very properly of the extreme ground taken by Baron Parke, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal and must have been acted on by the plaintiff."

In *Lovell* v. *St. Louis Life Insurance Company*, 111 U. S. 264, a life insurance company had terminated its business and transferred its assets and policies to another company, and the court held that this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the insurance company, to wit, the death of the insured, had not arrived. Mr. Justice Bradley, delivering the opinion of the court, said: "Our third conclusion is, that as the old company totally abandoned the performance of its contract with the complainant by transferring all its assets and obligations to the new company, and as the contract is executory in its nature, the complainant had a right to consider it as determined by the act of the company, and to demand what was justly due to him in that exigency. Of this we think there can be no doubt. Where one party to an executory contract prevents the performance of it, or puts it out of his power to per-

form it, the other party may regard it as terminated and demand whatever damages he has sustained thereby."

In *Dingley* v. *Oler*, 117 U. S. 490, it was held that the case did not come within the rule laid down in *Hochster* v. *De la Tour*, but within *Avery* v. *Bowden* and *Johnstone* v. *Milling*, since, in the view entertained by the court, there was not a renunciation of the contract by a total refusal to perform.

So in *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255, 264, involving a contract for the delivery of iron ore, the court said: "The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice, previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such."

In *Anvil Mining Company* v. *Humble*, 153 U. S. 540, performance had been commenced, but completion was prevented by defendant, and Mr. Justice Brewer, speaking for the court, said: "Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about."

In *Pierce* v. *Tennessee Coal & Railroad Company*, 173 U. S. 1, it was held that on discharge from a contract of employment, the party discharged might elect to treat the contract as absolutely and finally broken, and in an action to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn; and Mr. Justice Gray said: "The plaintiff was not bound to wait to see if the defendant would change its decision and take him back into its service; or to resort to

successive actions for damages from time to time; or to leave the whole of his damages to be recovered by his personal representatives after his death. But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract."

In *Hancock* v. *New York Life Insurance Company*, 11 Fed. Cas. 402, *Hochster* v. *De la Tour* was followed by Bond, J., in the Circuit Court for the Eastern District of Virginia; and in *Grau* v. *McVicker*, 8 Biss. 13, Drummond, J., fully approved of the principles decided in that case, and remarked: "It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterwards or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages."

Again, in *Dingley* v. *Oler*, 11 Fed. Rep. 372, Lowell, J., applied the rule in the Circuit Court for the District of Maine, and, after citing *Hochster* v. *De la Tour*, *Frost* v. *Knight*, and other cases, said: "These cases seem to me to be founded in good sense, and to rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic." And see *Foss Brewing Company* v. *Bullock*, 16 U. S. App. 311; *Hines Lumber Company* v. *Alley*, 43 U. S. App. 169; *Marks* v. *Van Eeghen*, 57 U. S. App. 149.

The great weight of authority in the state courts is to the same effect, as will appear by reference to the cases cited in the margin.[1]

On the other hand, in *Greenway* v. *Gaither*, Taney, 227,

[1] *Fox* v. *Kitton*, 19 Ill. 518; *Kadish* v. *Young*, 108 Ill. 170; *Roebling's Sons' Co.* v. *Lock Co.*, 130 Ill. 660; *Lake Shore R. R. Co.* v. *Richards*, 152 Ill. 59; *Burtis* v. *Thompson*, 42 N. Y. 246; *Windmuller* v. *Pope*, 107 N. Y. 674; *Mountjoy* v. *Metzger*, 9 Phila. 10; *Zuck* v. *McClure*, 98 Penn. St. 541; *Hocking* v. *Hamilton*, 158 Penn. St. 107; *Dugan* v. *Anderson*, 36 Maryland, 567; *Hosmer* v. *Wilson*, 7 Michigan, 294; *Platt* v. *Brand*, 26 Michigan, 173; *Crabtree* v. *Messersmith*, 19 Iowa, 179; *McCormick* v. *Basal*, 46 Iowa, 235; *Kurtz* v. *Frank*, 76 Indiana, 594; *Cobb* v. *Hall*, 33 Vermont, 233; *Daris* v. *Grand Rapids Co.*, 41 W. Va. 717; and other cases cited in the text books and encyclopædias.

Mr. Chief Justice Taney sitting on circuit in Maryland, declined to apply the rule in that particular case. The cause was tried in November, 1851, and more than two years after, at November term, 1853, application was made to the Chief Justice to seal a bill of exceptions. *Hochster* v. *De la Tour* was decided in June, 1853, and the decision of the Circuit Court had apparently been contrary to the rule laid down in that case. The Chief Justice refused to seal the bill, chiefly on the ground that under the circumstances the application came too late, but also on the ground that there was no error, as the rule was only applicable to contracts of the special character involved in that case, and the Chief Justice said as to the contract in hand, by which defendant engaged to pay certain sums of money on certain days: "It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action, upon which he might sue before the time of payment arrived."

The rule is disapproved in *Daniels* v. *Newton*, 114 Mass. 530, and in *Stanford* v. *McGill*, 6 N. Dak. 536, on elaborate consideration. The opinion of Judge Wells in *Daniels* v. *Newton* is generally regarded as containing all that could be said in opposition to the decision of *Hochster* v. *De la Tour*, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule.

In *Nichols* v. *Scranton Steel Company*, 137 N. Y. 471, 487, Mr. Justice Peckham, then a member of the Court of Appeals of New York, thus expresses the distinction: "It is not intimated that in the bald case of a party bound to pay a promissory note which rests in the hands of the payee, but which is not yet due, such note can be made due by any notice of the maker that he does not intend to pay it when it matures. We decide simply this case where there are material provisions and

obligations interdependent. In such case, and where one party is bound, from time to time, as expressed, to deliver part of an aggregate and specified amount of property to another, who is to pay for each parcel delivered at a certain time and in a certain way, a refusal to be further bound by the terms of the contract or to accept further deliveries, and a refusal to give the notes already demandable for a portion of the property that has been delivered, and a refusal to give any more notes at any time or for any purpose in the future, or to pay moneys at any time, which are eventually to be paid under the contract, all this constitutes a breach of the contract as a whole, and gives a present right of action against the party so refusing to recover damages which the other may sustain by reason of this refusal."

We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.

The other proposition on which the case of *Daniels* v. *Newton* was rested is that until the time for performance arrives, neither contracting party can suffer any injury which can form a ground of damages. Wells, J., said: "An executory contract ordinarily affords no title or interest in the subject matter of the agreement. Until the time arrives when, by the terms of the agreement he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action."

But there are many cases in which before the time fixed for performance, one of the contracting parties may do that which amounts to a breach and furnishes a ground of damages. It has always been the law that where a party deliberately incapacitates himself or renders performance of his contract impossible, his act amounts to an injury to the other party, which gives the other party a cause of action for breach of contract; yet this would seem to be inconsistent with the reasoning in *Daniels* v. *Newton*, though it is not there in terms decided "that

an absolute refusal to perform a contract, after the time and under the conditions in which plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future." *Parker* v. *Russell*, 133 Mass. 874.

In truth, the opinion goes upon a distinction between cases of renunciation before the arrival of the time of performance and those of renunciation of unmatured obligations of a contract while it is in course of performance, and it is said that before the argument on the ground of convenience and mutual advantage to the parties can properly have weight, "the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case."

We think that there can be no controlling distinction on this point between the two classes of cases, and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus penitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance?

As Lord Chief Justice Cockburn observed, in *Frost* v. *Knight*, the promisee has the right to insist on the contract as subsisting and effective before the arrival of the time for its performance, and its unimpaired and unimpeached efficacy may be essential to his interests, dealing as he may with rights acquired under it in various ways for his benefit and advantage. And of all

such advantage, the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. While by acting on such repudiation and the taking of timely measures, the promisee may in many cases avert, or, at all events, materially lessen the injurious effects which would otherwise flow from the nonfulfillment of the contract.

During the argument of *Cort* v. *Ambergate Railway Company*, 17 Q. B. 127, Erle, J., made this suggestion: "Suppose the contract was that plaintiff should send a ship to a certain port for a cargo, and defendant should there load one on board; but defendant wrote word that he could not furnish a cargo; must the ship be sent to return empty?" And if it was not necessary for the ship owner to send his ship, it is not perceived why he should be compelled to wait until the time fixed for the loading of the ship at the remote port before bringing suit upon the contract.

If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in instalments, then when the default happened in October, 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years. But treating the four outstanding contracts as separate contracts, why is it not equally reasonable that an unqualified and positive refusal to perform them constitutes such a breach that damages could be recovered in an immediate action? Why should plaintiff be compelled to bring four suits instead of one? For the reasons above stated, and having reference to the state of the authorities on the subject, our conclusion is that the rule laid down in *Hochster* v. *De la Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day.

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by

reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. *Hinckley* v. *Pittsburg Company*, 121 U. S. 264. Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.